

TOWARDS TRANSFORMATIVE HUMAN RIGHTS PRACTICES:
A RECONSIDERATION OF THE ROLE OF CANADIAN LEGAL INSTITUTIONS
IN ACHIEVING SOCIAL JUSTICE

by

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ABSTRACT

This thesis examines the tension between the evolving demand for the protection and promotion of human rights and the dissatisfaction with the legal institutions charged with these responsibilities. This problematique is examined and reconstructed with the objective of determining how Canadian legal institutions could be structured so as to more effectively contribute to the achievement of social justice.

A critical theory approach is undertaken in this thesis. This method involves the development of a transformative ideal against which current practices are examined. This juxtaposition illuminates both the problems with, and the possibilities of, the courts and human rights commissions in interpreting and applying human rights norms.

The transformative ideal comprises two elements. The first element postulates that the legal institutional role should be conceived as contributing to a broad and evolving discourse on human rights and responsibilities within the public sphere. The second element holds that this role should be enhanced through the development of transformative human rights practices and their integration into legal processes.

The transformative ideal is constructed through a series of six discussions comprising: (1) the development of an analytical framework based on the concepts of social transformation, social justice, human rights and the right to equality; (2) an examination of the critique of the role and functions of courts and human rights commissions; (3) an elaboration of a normative account of the public sphere and discourse together with a discussion of the role of human rights norms therein; (4) a discussion of current mediation practices in the human rights context leading to the development of a normative model of transformative mediation; (5) an examination of the transformative ideal in human rights commission practices; and (6) an exploration of the transformative ideal in court practices.

The thesis concludes that the transformative ideal and particularly the concept of transformative human rights practices, will assist in reform of Canadian legal institutions so as to enhance social justice.

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INTRODUCTION

The human rights social movement has emerged and developed rapidly since the Second World War, becoming a powerful force for change in many parts of the world. Increasingly, we have witnessed the progressive institutionalization of this movement.

These decades have been marked by the proliferation of international human rights agreements, regional conventions and national legal and constitutional protections as well as the emergence of a jurisprudence of human rights based on these instruments. These developments provide a number of interacting normative orders which individuals and groups can employ to improve their lot vis-a-vis both the state and other individuals, organizations and corporations. The proliferation of instruments over time is marked by a move from fairly general and abstract rights, to a series of derivative rights each one supported by, and more concrete than, the last.

A reciprocal trend is the increasing recognition in international law and in the domestic law of most Western nations that legal institutions and the judiciary have a central role to play in protecting rights. Initially, this was seen as protecting the individual from arbitrary governmental interference and from discriminatory acts by other individuals and non-state agencies. Increasingly though, the courts have been called upon to promote human rights and enforce a broader range of governmental obligations.

Yet, the legal enforcement of human rights remains controversial. Within Canada, the courts and human rights commissions have come under increasing criticism from many quarters, both from those who voice general support for the legal system's role in promoting human rights and those that oppose it. Charges of "judicial activism" and "power-hungry" "radical" commissions abound as the legal institutions charged with this mandate step over invisible and ever-changing lines between acceptable judicial and quasi-judicial activity and into what the critics call the mine field of "value

judgment", "social and economic policy" and "social engineering". Opposite criticisms also ring out as the courts and commissions are blamed for being too timid and deferential.

This apparent contradiction sets the parameters of the basic problem discussed in this study. On the one hand, there is an evolving demand for protection and promotion of human rights, and on the other hand, dissatisfaction with the institutions charged with these responsibilities and the processes through which they carry out their work.

The first goal of this study is to examine this problematique with a view to reconstructing it. Rather than focussing on the more limited issue of whether or not legal institutions should be enforcing rights, the underlying question is what role **could** Canadian legal institutions have in contributing to the protection and promotion of human rights. The focus is on the latent potential of the courts and commissions, with the critique of their current operation serving as a starting point rather than as providing a definitive framework for assessing concerns about the roles and operations of courts and human rights commissions.

The second goal is to determine how legal institutions could be structured so as to be as effective as possible in contributing to enhanced social justice. The premise is that legal institutions have an important, but currently only partially fulfilled, role in this process.

These goals can be stated in the form of two questions: Are legal institutions as they are currently conceived and operated accomplishing their part of the task of achieving social justice? If not, what types of institutional and process changes should be considered?

The premise of this study is that answers to these questions can not be found within the current understanding of legal institutional roles and practices. This current understanding is limited by a philosophy that places undue emphasis on the competitive aspects of human nature and insufficiently recognizes the social and relational character of human interactions. In the legal system, this results in a privileging of adversarialism at the expense of all other approaches.

The thesis is that a more profound understanding of the legal institutional role and practices can be achieved through the formulation of a transformative ideal. This ideal comprises two elements. The first element is that the legal institutional role should be conceived as a contribution to a broad and evolving discourse on human rights and responsibilities within the public sphere. The second is that this role should be enhanced through the development and integration of transformative human rights practices. Together these two elements forge an ideal that enlarges our thinking about the legal institutional role and processes.

The analytical approach undertaken in this thesis is based on critical theory and proceeds by presenting normative ideals that demonstrate the limitations of existing practices and provide guidance for the development of alternatives. The study is founded on a normative conception of social justice which is informed by substantive equality concepts. It is thus dedicated to an engagement with what ought to be rather than simply with what is. The underlying perspective is that rights enforcement can best be seen as a social practice within the overarching framework of "law as a social learning process."¹ The structures of legal institutions and their interplay with other facets of society are seen to be important factors in determining the impact of human rights law in achieving social justice. Issues related to legal institutional roles and functions are most often treated at either a fairly abstract level of legal and political theory or with an unreflective focus on current practice. This study tries to overcome the theory/practice divide by connecting conceptual discussions with practical reconstruction.

While this study may have implications for the protection and promotion of human rights generally, the focus here is on equality rights. The perspective taken is that the objective of the human rights social movement is the achievement of social justice through the promotion of rights, and particularly, equality rights. Equality is not the goal, but rather a tool to ameliorate the situations of those individuals and groups who experience discrimination, inequality and disadvantage based on

¹This is the term used by Jurgen Habermas and developed most extensively in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans. William Rehg (Cambridge, Mass: The MIT Press, 1996).

their identity. Examples and issues are drawn from the legal struggle for women's equality in Canada, but the focus is on institutional structure and procedure rather than on the substantive content of equality rights jurisprudence.

Most reform efforts in the civil and administrative justice arenas, including those directly related to human rights enforcement, focus on efficiency concerns, namely, how to reduce the cost and delay involved in resolving disputes. Broader reform approaches may also address other barriers to access to justice, such as procedural complexity or the need for different forms of legal representation. In contrast, this study is primarily focussed on qualitative issues, that is, an assessment of the quality of both the process and outcome of human rights adjudication/resolution as viewed from a social justice perspective.

At the outset, transformative human rights practices are defined in general terms as practices that consciously make social justice, rather than dispute resolution, their primary aim. Each chapter of this study builds on this initial definition to work towards a full understanding of the transformative ideal. This involves locating human rights practices in a broader range of situations and processes and integrating a number of principles and qualities. Transformative human rights practices are deliberative, participatory, public and prospective. They are processes of reason which incorporate the principle of equality in a fundamental way and actively resist the operation of power and privilege. These practices are focused on resolution rather than settlement and integrate process and outcome in a more fundamental way than do most current practices. Together these qualities give human rights practices their transformative potential.

The first step in constructing the transformative ideal is the development of a framework for understanding the role of human rights in achieving social justice. Chapter 1 briefly describes the critical theory approach and social transformation perspective that underlie this study. The concepts of social justice, rights and equality rights are explored and defined for the purposes of this study. These foundational concepts are brought together to establish an analytical framework within which

the thesis questions are framed and explored. The idea of transformative human rights practices is sketched out in a preliminary way at the end of this chapter.

The potential legal institutional role with respect to transformative human rights practices is examined in Chapter 2. This examination reviews and reformulates the problematique of the role of legal institutions in the field of human rights. It begins with a summary of the main criticisms of the courts, human rights commissions and litigation/settlement processes which have currency within Canada today. This examination provides an overview of questions about the appropriate role of legal institutions and the functioning of courts and the commissions with respect to human rights.

A critical review of these commentaries is undertaken and furnishes the basis for a restatement of the problem from a transformative social justice perspective. The concluding section reframes these issues and relates them to the transformative ideal. The two main elements of the ideal are posited: that the legal institutional role should be conceived as promoting a broad human rights discourse and that human rights practices should integrate a transformative mediation practices.

Chapter 3 elaborates the first element of the transformative ideal, that is, seeing the role of legal institutions as promoting a broader human rights discourse. It is proposed that this potential role can be assessed within the construct of the public sphere. Drawing on social, political and linguistic theories, this study sets out a normative account of the public sphere, discourse, and the role of basic rights norms therein. This ideal account provides an innovative approach to understanding the role of courts and human rights commissions, the dialogue between legal and political institutions, and other potential sites of human rights discourse and practices. It also provides a principled framework for the development of transformative human rights practices.

Chapter 4 investigates the second aspect of the transformative ideal, that is, the promotion of transformative mediation practices. The focus is on the potential of integrating the transformative ideal in the context of the complaints processes established by Canadian human rights commissions. It reviews existing models of mediation and current commission practices. The philosophy and principles of transformative conflict resolution are discussed and one specific model of narrative

mediation is presented as a base for developing transformative mediation practices in the human rights context. Several overarching issues relating to the implementation of mediation in this context are identified and discussed with a view to understanding the potential of transformative human rights practices.

Chapters 5 and 6 explore a number of practical steps that could be taken to apply this transformative ideal in the practices of human rights commissions and the courts. Chapter 5 discusses the role of commissions in fostering transformation and proposes specific ways that transformative practices could be integrated into the two main commission functions of addressing discrimination and promoting equality. Chapter 6 investigates what the transformative ideal could mean for the role and functions of the courts with respect to human rights. The focus here is on the requirement to develop a public theory of the function of courts and related litigation practices that are consistent with this ideal. These practical applications further inform the concept of transformative human rights practices.

The concluding chapter draws together the various components elaborated in this study and restates the transformative ideal. It reviews the dynamics of reform processes and mechanisms to evaluate progress toward this ideal. Movement toward transformative human rights practices requires recreating the public sphere along the normative lines established in the study. The public sphere will be strengthened by fostering a human rights ethos through enhanced dialogue between legal institutions, political institutions and civil society. A transformative remedial discourse is posited as one way to foster this ethos. Finally, a brief concluding section and epilogue underscore the relationship between transformative human rights practices and achieving social justice.

CHAPTER 1

SOCIAL JUSTICE, THE RIGHT TO EQUALITY AND THE TRANSFORMATIVE POWER OF WHAT COULD BE

1.1 Overview

This introductory chapter briefly describes the critical theory approach and social transformation perspective that underlie this study. The concepts of social justice, rights and equality are explored and defined for the purposes of this study. These foundational concepts are brought together to establish an analytical framework within which the thesis questions are framed and explored.

1.2 A Critical Theory Approach

The framework for understanding the nature and function of rights is largely set by the assumptions of liberal legalism which is the primary legal paradigm in Western democracies. The essential features of liberal legalism are outlined in the following statement:

Its essential features are the commitment to general "democratically" promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism consists of a complex set of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis ("legal reasoning").¹

¹K.Klare, "Law-Making as Praxis"(1979), 12 *Telos* 123, at 132.

In particular, this approach has a commitment to a formal or procedural rather than a substantive conception of justice.² However, this predominant paradigm is being challenged by the emergence of alternative approaches, including the critical legal paradigm. This nascent paradigm has its roots in the wider philosophy of critical theory.

Critical theory is, following the method of Hegel and Marx, "the self-clarification of the struggles and wishes of the ages."³ The assumption of "self-estrangement" or "false consciousness", that an individual is blind to the true situation, is at the heart of critical theory. The task of the critical theorist is to reconstruct the subjective conditions of knowledge so that the obstacles (such as ideology) which block self-reflection, can be clarified.

A second fundamental element of the critical approach is that theory and reality are inseparable. Reality is not something which can be perceived objectively for it is socially-constructed: the way in which we view a social phenomenon affects the phenomenon itself. A related aspect of this "latent nexus" of theory and reality,⁴ is that a theoretical perspective encompasses a form of action. The work of the critical theorist is by definition political practice. The goal is radical change: " A critical theory wants to explain a social order in such a way that it becomes itself the catalyst which leads to the transformation of that social order."⁵

²*Ibid.*

³Karl Marx, "Letter to A. Ruge, September 1843," in *Karl Marx: Early Writings* (Vintage Books, 1975), 204-210, at 209. The work of individuals associated with this approach are numerous and diverse. Good introductions to this body of work include: David Held, *An Introduction to Critical Theory: Horkheimer to Habermas* (Berkeley: University of California Press, 1980); Richard Bernstein, *The Restructuring of Social and Political Theory* (Philadelphia: University of Pennsylvania Press, 1976); Paul Connerton, ed., *Critical Sociology: Selected Readings* (London: Penguin, 1976). In my opinion, two of the most accessible overviews are presented by Brian Fay in *Social Theory and Social Practice* (London: Allen & Unwin, 1975) and *Critical Social Science* (Ithaca, NY: Cornell University Press, 1987).

⁴Jurgen Habermas, "Postscript to *Knowledge and Human Interests*"(1981), 1 *J. of Philosophy of Science* 42.

⁵Fay, *Critical Social Science*, at 22.

There are a number of approaches to law that come within the overarching philosophical understanding of critical theory. These include: critical legal studies⁶, critical racism⁷, critical feminism,⁸ and critical race feminism.⁹ These approaches are at a relatively early stage of development marked by continuing contestation over basic elements on the part of critical legal scholars and challenges from other emerging approaches, particularly those originating from a post-modernist and/or difference perspective. This study does not subscribe to a particular critical legal approach. Rather, it is based more directly on the general tenets of critical social science and is heavily influenced by the work of Jurgen Habermas and Iris Marion Young.

Critical theory involves a socially and historically situated normative analysis and argument. Several features of the critical approach are highlighted in this study. First, 'critical' analysis implies showing connections and causes which are hidden. It also implies intervention, for example providing resources for those who may be disadvantaged through change.¹⁰ In this way there is an intimate connection between theory and action.

Many critical legal studies approaches have not fully played out this critical potential. Thus, for example, while they have demonstrated the falsity of the liberal legalist dichotomies such as

⁶For example, see: Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975) and *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1986); David Kayris, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982). For a discussion of the differences between critical legal studies and critical theory see Frank Munger and Carroll Seron, "Critical Legal Studies v. Critical Legal Theory" (1984), 6 *Law and Policy* 280.

⁷For example, see: Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishers, 1999); Derrick Bell, *Race, Racism and American Law* 3d ed. (Toronto: Little, Brown and Company, 1992); Richard Delgado, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

⁸For example, see: Donna Greschner "Judicial Approaches to Equality and CLS" in *Equality and Judicial Neutrality*, ed. Sheila Martin and Kathleen Mahoney (Toronto: Carswell, 1987); Seyla Benhabib and Drucilla Cornell, eds., *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987); Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989).

⁹See, for example, Adrien Katherine Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997).

¹⁰Norman Fairclough, *Discourse and Social Change* (Cambridge: Polity Press, 1992), at 9.

law/politics and public/private, they have not gone on to achieve the synthesis of these categories of thought. To say that law is political and thus indistinguishable from other forms of action is extremely limiting. The full critical approach would go on to reconstruct law as a form of politics with an emancipatory potential.¹¹

Secondly, while critical theory is premised on the realization that the dichotomy between the objective and subjective is a false one, it does not yield to a post-modern acceptance of the impossibility of reason or shared understanding. Rather, it rests on the philosophical commitment to the possibility of establishing criteria of validity and rationality while taking into account the fragmentation of modern society.

Thirdly, critical theory is a theory "that does not reduce reality to what exists."¹² It involves the creation of critical space where change can be imagined. One of the ways that critical theory works is through the positing of ideal constructions that serve to demonstrate the problems with existing structures or concepts. These ideals also create the potential for change through imagining an alternative reality.

The purpose of this normative approach is to identify and draw out from existing social relations "what we experience as valuable in them, but as present only partially, intermittently or potentially."¹³ A critical approach assists us to reflect on these "glimmering possibilities":¹⁴

Ideals are neither descriptions nor blueprints; they correspond neither to a present nor to a future reality, precisely because they express ideals. They allow thinkers and actors to take

¹¹This focus on reconstruction is one of the great strengths of Jurgen Habermas' work. See discussions of this aspect below and in Chapter 3.

¹²B. de Sousa Santos, "Oppositional Postmodernism and Globalization" (1998), 23 *Law and Social Inquiry* 121, at 122.

¹³Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), at 10.

¹⁴*Ibid.*

a distance from reality in order to criticize it and imagine possibilities for something better.¹⁵

The positing of alternative ideals reveal deficiencies but also help us to envision transformative possibilities. For example, the framework developed in this chapter is based on the reconceptualization of "equality" in a way that demonstrates that the constraints in its current usage within the legal system are not inherent in the concept itself. Rather, these constraints are attributable to the narrowness of our understanding and application of "equality". This critical review uncovers the potential in equality and assists in unleashing the "transformative power of what could be".¹⁶ Similarly, while the analysis begins with a review of the courts and human rights commissions as they currently operate, these do not set the limits of the study, they are only a departure point.

In this critical theoretical context, I employ Habermas's idea of law as a social learning process as a starting point. The role and operation of the law is founded in the recurrent tension between "facts and norms."¹⁷ This is the tension between the empirical application of norms by various institutions which constitutes the social force of law (its 'facticity'), and those normative claims to embody the values of equality, freedom and justice upon which law's claim to validity depend. When he locates law as being "between facts and norms", Habermas means that law consists of both: (1) its factual generation, administration and enforcement in social institutions and (2) the norms upon which its claim to validity is based and on account of which it deserves general recognition. The tension between 'facts' and 'norms' is a creative force which leads to social learning.

Legal norms are both the subject of discourse and at the same time, legal norms frame discourse. The fact that normative expectations are not met does not lead to changes in the underlying norms

¹⁵*Ibid.*

¹⁶Helen Stacy, "Positivism and Difference," in *Judicial Power, Democracy and Legal Positivism*, eds. Tom Campbell and Jeffrey Goldsworthy (Aldershot, England: Dartmouth Publishing Company, 2000), 139-168, at 163.

¹⁷Habermas, *Between Facts and Norms*.

themselves. To this extent the legal system is closed. However, law remains "cognitively open" to its environment in that: "Learning, or development in law, occurs in virtue of its "programming", which allows the legal system to adapt to new situations by developing new "programs"; that is, by creating new norms."¹⁸

One example of law as a social learning process is "the dialectic of legal and factual equality."¹⁹ The one-sided formal character of the conception of legal equality promoted by the liberal paradigm only serves to underscore the factual reality of inequality of many persons within a society. This tension engenders the need to supplement formal equality with more substantive conceptions of material equality which are often characterized as positive welfare rights. However, the social welfare approach that arises to compensate for the mismatch between formal-legal equality and actual inequality tends to result in uneven and even self-contradictory outcomes. This new tension does not mean that we should abandon equality norms. Rather, it gives rise to the need for a new normative approach to equality.

From this perspective, one of the main concerns is defining the conditions through which the tension between the factual reality of the law and its normative base is played out and leads to greater social justice. This thesis is in large measure dedicated to exploring under what conditions human rights practices as one element of law as a social learning process can contribute to greater social justice.

1.3 A Social Transformation Perspective

A comprehensive theory of social change is one of the ongoing projects of sociological theory. Attempts to construct such a theory were initiated in the 18th century with pioneering theoretical work which established some of the basic concepts necessary for the analysis of social change. This work has continued throughout the 19th and 20th centuries through a series of evolving, although

¹⁸*Between Facts and Norms*, Translator's Introduction, at xxiii.

¹⁹Habermas, *Between Facts and Norms*, extended discussion at 409-447.

iso contradictory theoretical approaches.²⁰ Theories of social change are diverse and incompatible: "they do not converge towards a happy synthesis".²¹

One of the important dividing lines is between social change theories that emphasize human agency and idealism and those approaches that emphasize evolutionary trends and structures as if beyond human construction or intervention.²² The former can be grouped together under the rubric of "social becoming" as the essence of historical change. These various theories emphasize different aspects of social becoming, including: ideas; normative emergence through evasions and innovations; great individuals; social movements; and revolutions.²³ The critical theoretical approach straddles this division. It is informed by structural and material understandings of society but is committed to exploiting the potential of human action to transcend the existing social situation. Social change theories that feature human agency highlight the essential openness of society, in contradistinction to those that view society from a more concrete, structural position. This essential openness contains a greater potential for social change, including change through human consciousness.²⁴ These approaches recognize the potential of individual values as a driving force for social change.

²⁰For an excellent overview of these approaches see: Trevor Noble, *Social Theory and Social Change* (London: MacMillan Press, 2000). Noble highlights the following in his intellectual history of this project: the emphasis on structure and the unintended consequences of human action in Adam Smith's theory; the evolutionary and neo-evolutionary theories of Comte, Spencer, Parsons and others; Marx's theories of revolutionary change; theories emphasizing the role of elites (such as by Tonnies and Pareto); Weber's social action theory of Weber; Durkheim's sociological realism; and more recently systems theory approaches and a multitude of approaches to theorizing the consequences of modernity and postmodernity.

²¹ *Id.*, at 4. Noble sets out the six key issues for theories of change: (a) the character of change: (1) Change is endogenous vs. exogenous; (2) Change is inevitable vs. contingent (e.g. the idea of progress vs. the rejection of metanarratives); (b) **the character of the social**: (3) Sociological Realism (structure) vs. Methodological Individualism (Agency); (4) Materialism vs. Idealism; (c) **the character of explanation**: (5) Possible Objectivity (Science) vs. Inescapable Commitment (Ideology); (6) Rationalism vs. Empiricism.

²²P. Sztompka, *The Sociology of Social Change* (Oxford: Blackwell Publishers, 1993).

²³*Ibid.*

²⁴Fred Twine, *Citizenship and Social Rights: The Interdependence of Self and Society* (London: Sage Publications, 1994), at 84.

Human agency need not be seen solely in individualistic terms. Rather, human nature has a fundamentally social and interdependent character. This basic assumption leads social theorists to emphasize relationships rather than social categories, and consequently to take a different approach to understanding social change. The focus is on contextualized human activity as seen through "institutional relationships and relational networks."²⁵ It follows that social change, from this perspective, "is viewed not as the evolution or revolution of one societal type to another, but by shifting relationships among institutional arrangements and cultural practices that comprise one or more social settings."²⁶

My conceptualization of social change flows from these ideas and is further informed by the work of Canadian political scientist Kenneth McCrae in his work on politics in plural societies.²⁷ While not fully developed as a model, McCrae's more empirical work is shaped by his conceptualization of social change as taking place on four dimensions.²⁸ In my reformulation, these dimensions are characterized as: individual and group perceptions, behaviours and attitudes; ideas and ideology; institutions; and structure.²⁹ These dimensions are overlaid by time and space dimensions, which

²⁵Margaret Somers, "Rights, Relationality and Membership: Rethinking the Making and Meaning of Citizenship"(1994), 19 *Law and Social Inquiry* 63, at 72.

²⁶*Id.*, at 73.

²⁷I had the opportunity to discuss this model in several of Professor McCrae's seminars on politics in plural societies during my graduate work in international affairs at the Norman Paterson School of International Affairs, Carleton University in 1984-85.

²⁸McCrae's common framework of analysis for his inquiry into the factors that increase or reduce linguistic tensions involves four factors: (1) historical traditions and developmental patterns; (2) the social structure of the language communities, and relationships between linguistic cleavages and other societal cleavages; (3) the perceptions and attitudes of the language communities; and (4) constitutional and institutional arrangements for languages and language groups in the public and private sectors. Kenneth D. McCrae, *Conflict and Compromise in Multilingual Societies*, (Waterloo: Wilfred Laurier Press, 1986), at 1.

²⁹In this model of levels of change, the structural level can extend to elemental, underlying societal structures including the economy and hence to transforming foundational structures and the distribution of power within society. However in this study, references to structure relate to reform in the sense of the creation of new institutions or changes in the relationships between institutions, while institutional change reforms to change within an institution. Although the eventual goal of social justice requires transforming underlying structures, this study does not address it directly. Rather, the other types of reforms are suggested here with a view to eroding these deep structures and their gradual and eventual replacement by just social structures.

allow the prism of history and geography to be factored into the analysis of change.

This model is an intricate one that appears to best match the complexity of human interaction as mediated by institutional and structural arrangements and relationships. It is dynamic in that it builds in loops for learning and institutional/structural change. It allows for the ways that these various dimensions or levels of change co-create each other and avoids a simplistic reduction to one element as fundamental.

Conceptualizing social phenomena in this way fosters a critical approach because it encourages us to get away from seeing the existing status quo as the one possible reality. It is important not to reify any one element of society nor to take anything as an immutable given. While power relations and structures can appear to be unchangeable, this is a false perception. While the reinforcing structural, cultural and institutional patterns of inequities appear static, each contains roots of instability. Power relations are thus both patterned and fluid. An expanded time perspective is critical to this analysis because a longer term view creates greater opportunities for envisioning change. This analytical approach also helps to overcome the tendency to conflate what we see with what could be.

Social psychological research provides a useful model that can be applied to understanding change both in individuals and social systems.³⁰ All change processes can be envisioned as encompassing three critical psychological components: motivation, resistance and commitment to change.³¹ Motivation occurs through the development of an openness toward something different. It is an "unfreezing" in the sense of a melting of the solidity of the current state and is affected by driving

³⁰K. Lewin, "Group Decision and Social Change," *Readings in Social Psychology*, eds. E.E. Maccoby, T. Newcomb, and E. Hartley (Austin, Texas: Holt, Rinehart and Winston, 1947) cited in Eric C. Marcus, "Change Processes and Conflict" *The Handbook of Conflict Resolution* eds. Morton Deutsch and Peter Coleman (San Francisco: Jossey-Bass Publishers, 2000), 366-81, at 366.

³¹Marcus, at 366. These phases correspond to Lewin's earlier conceptualization of change as "unfreezing, movement, refreezing."

and restraining forces. This results in action that changes the individual or moves the social system to a new level.

Complex processes operate to make such movement difficult. One of the key ones is resistance which plays a strong role in the transition process. Resistance is the mobilization of energy to protect the status quo in the face of a real or perceived threat. The commitment to change is in effect a "refreezing" that establishes actions or processes that support the new level of behaviour and lead to resilience against those resistant forces, patterns and behaviour. Most often deliberate steps are required to restabilize a system to its new or changed level of behaviour. Commitment is a key psychological construct here. It denotes a state in which we become bound by our actions and our belief about those actions keep us from returning to old patterns.³²

One of the notable features of this model is that resistance plays a constructive role in the change process. It is a naturally emerging part of the change process, or any movement away from the status quo. Mobilization of forces against change is a necessary prerequisite of successful change: "Change without resistance is akin to premature conflict resolution; the parties involved manage to avoid those necessary parts of the process that lead to real change (or real resolution)."³³

Another essential feature of the understanding of social change utilized in this study is the concept of alternatives. It is the awareness of the possibility of alternatives, particularly when the present situation is in conflict with superordinate values of justice, fairness and equity, which provides an opening and initiates the search for change.³⁴ These alternatives include: alternative myths to serve as the basis for justice; alternative criteria for assessing fairness; and alternative visions of relationships and institutions.

³²R. Beckhard and R. Harris, *Managing Organizational Transitions*, 2d ed. (Reading, Mass: Addison-Wesley, 1987).

³³Marcus, at 373.

³⁴B. Moore, *Injustice. The Social Basis of Obedience and Revolt* (New York: M.E. Sharpe, 1978).

Relations of inequality are stable only in the absence of cognitive alternatives or cracks in the collective cognitive image which create the possibility of alternatives. This proposition has been demonstrated in social psychological research into the operation of minority influences processes.³⁵

Alternatives help to create understanding on the part of dominant groups that change is needed. Alternatives work by illustrating the illegitimacy or injustice of the status quo. An alternative serves as new information which must be interpreted through the formulation of new categories. They tend to encourage innovation and the production of solutions which have not been offered before.

The trajectory of social change never follows a straightforward linear path. One of the challenges for activists is that reform measures are often short-lived. Human capacity appears doomed, or at least heavily circumscribed by forces that seem beyond our grasp. Dominant political and economic structures can appear "natural" or at least unassailable, because they reassert themselves again and again. This cyclical nature of social change results in hard-won "victories" for social justice becoming quickly devalued and "domesticated."³⁶ This unhappy cycle suggests that change may be too limited or timid a concept.

One way to deal with these concerns is to look beyond the concept of social change in general terms and to refocus instead on the outcome of a change process. Change processes can lead to incorporation, transformation or democratization.³⁷ The degree of change achieved is greater with each of these three outcomes. Incorporation refers to the process by which reform claims are taken up by sectors of the society or public opinion in a way that leads to changes in practices and institutions. Transformation aspires to more fundamental change that transforms both formal

³⁵For example, see: G. Mugny, "Negotiations, image of the other and the process of minority influence" (1975), 5 *European Journal of Social Psychology* 209; G. Mugny, *The Power of Minorities* (London: Academic Press, 1982); C.J. Nemeth and J. Wachtler, "Creative problem-solving as a result of majority versus minority influence" (1983), 13 *European Journal of Social Psychology* 45.

³⁶Paula Allman, *Revolutionary Social Transformation. Democratic Hopes, Political Possibilities and Critical Education* (Westport: Bergin & Garvey, 1999), at 3-4.

³⁷M.Giugni, "Introduction: Social Movements and Change: Incorporation, Transformation, and Democratization" in *From Contention to Democracy*, eds. M.Giugni, McAdam and Tilly (Lanham, MD: Rowman & Littlefield Publishers, 1998).

institutions and social institutions, in the sense of day to day interactions.³⁸ Democratization presupposes incorporation, transformation or both as contributors to a specific direction for social change. In essence, it is a change process that redefines the relationship between the state and citizen along increasingly democratic lines.

Following from this typology, this study argues that the fundamental changes required to achieve social justice are more aptly described as social transformation. The concept of social transformation recognizes the degree of change required by human rights norms and the nature of structural resistance to these changes.³⁹ Social transformation involves a "process through which people change not only their circumstances but themselves".⁴⁰ For example, through an "education process that simultaneously transforms educational relations."⁴¹ Social transformation is the goal of a critical approach. It involves not surrendering to the power of the existing structure of relations but, rather, refocusing on agency with the goal of transforming both the self and society.

In summary, the model of social transformation underlying this thesis is grounded in the potential of human activity contextualized by a relational and structural view of society. Transformation occurs through change at four interacting levels: individual and groups; ideas and ideology; institutions; and structure. It takes the form of shifts in attitudes and behaviours, relationships among institutional arrangements and cultural practices. It takes into account existing power structures and relationships but focuses on the potential to transform them. Ideas in the form of alternatives play an important role in the transformation of both self and society. At both the

³⁸*Ibid.*, at xix.

³⁹There is a strong connection between greater democratization and social justice. This connection is developed to some extent in Chapter 3 which links theories of deliberative and communicative democracy with increased potential of human rights practices. However, because the focus in this study is on transformative human rights practices and the role of legal institutions, I have opted to use the term transformation rather than democratization.

⁴⁰Allman, at 1.

⁴¹*Ibid.*

individual and societal level, transformation takes place through the dialectic between movement and resistance.

Social transformation is not a thing to be gained, rather it is a process elaborated in various sites of practice. The practice of human rights is one of those sites, one which is given primary importance in contemporary global society.

1.4 A Transformative Framework

One of the challenges of critical legal studies and critical social science is one of language or terminology. Many of the central concepts used to describe the operation of law in society are themselves highly contested and subject to apparently interminable debate. They have one meaning under the liberal legal paradigm and another under alternative accounts. As a result, the first step in developing an analytical framework is to specify the meaning of main terms and to sketch out their inter-relationships.

This section reviews the key concepts that underlie the problematique examined in this study. These are: social justice; rights; and the right to equality. There is no one accepted definition or understanding for any of these concepts, in fact volumes have been written on each of them. It is impossible and unnecessary to fully summarize these debates. Rather each of these terms is briefly examined, critically reviewed and reformulated. This reformulation provides the foundation upon which the examination of the function of legal institutions can be carried out.

A. Social Justice

Social justice is an idea that can be appreciated intuitively, but one which defies concrete definition. The three main approaches to the explication of social justice are theoretical, situational, and procedural.

The first approach is to develop a grand theory of social justice, one that encompasses a broad range of situations. Such a theory would explain "the underlying principles that people use when they judge some aspect of their society to be just or unjust."⁴² One such theory, developed by David Miller, suggests that social justice is based on three underlying principles: desert, need, and equality. These different norms of justice are applied in different social contexts. He also notes that we have an intuitive sense of justice which tells us that "this" principle must be applied in "this" context.⁴³ Despite its flexible and contextual nature, social justice is a coherent concept weaving together the principles of desert, need and equality.

A second approach is to define social justice in more pragmatic terms. This method is preferred by social activists. Thus, the term "social justice" can be seen as referring to "the constellation of theories and practices which are chiefly concerned with analyzing and addressing persistent social inequities."⁴⁴ From this perspective, social justice is not an overarching grand theory of justice, but a situational one. Social justice can be distributive, recognition-oriented, retributive, about process or about substantive outcomes, depending on the context.⁴⁵

A third approach to understanding social justice and the one emphasized in this study is a procedural, as opposed to a substantive, one. From this perspective, social justice is more about the means of attaining welfare, than welfare itself. It describes the ways in which a range of social institutions and practices together influence the share of available resources to different people.⁴⁶ Social justice operates through a culture, not simply through formal institutions.

⁴²David Miller, *The Principles of Social Justice* (Cambridge: Harvard University Press, 1999), at ix.

⁴³*Id.*, at 32.

⁴⁴Mara Schoeny and Wallace Warfield, "Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution" *Negotiation Journal* 253 (July 2000), at 261.

⁴⁵Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice"(1998) 10 *Canadian Journal Of Women and the Law* 60.

⁴⁶Miller, at 11.

From this perspective, the two ideals of social justice are the values of self-development and self-determination.⁴⁷ These two general values correspond to two general conditions of injustice: oppression, that is institutional constraint on self-development; and, domination, that is institutional constraint on self-determination.⁴⁸ Social justice is equated with the institutional conditions for promoting self-development and self-determination of a society's members.⁴⁹

Social justice thus encompasses both a substantive ideal (defined in abstract or situational terms) and a procedural one. Agreement on the specific content of social justice is less important than understanding its role in social transformation processes. It has been selected as a foundational concept here because of its critical, motivational and comprehensive qualities.

Social justice can retain a critical edge, for if its principles are taken seriously they will guide us toward making substantial changes in our institutions and practices. The commitment to justice is necessary for effective social change.⁵⁰ Here, the term 'social justice' has a normative and transformative content. It contains a critique of the current situation as "unjust" in at least some aspects and an alternative conception of justice which both serves as a mirror to point out the current deficiencies and as a guide for reform. It challenges us to reform our institutions and practices in the name of greater fairness. Social justice is an aspirational concept. It is not predefined since conceptions of social justice evolve over time.

The goal of "the just society" is particularly resonant within Canada, even if one does not subscribe

⁴⁷Young, *Inclusion and Other*, at 31-33.

⁴⁸Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), at 3-8.

⁴⁹Young, *Inclusion and Democracy*, at 33. See also Habermas's focus on autonomy in this regard, discussed in Chapter 3.

⁵⁰W. Austin, "Justice, Freedom and Self-Interest in Intergroup Conflict" in *The Social Psychology of Intergroup Conflict*, ed. W. Austin and S. Worchel (Belmont, CA: Wadsworth Inc., 1979), at 123.

to the Trudeau vision of it. The "just society" is not a description, but a dream.⁵¹ Social justice is something that we can relate to, both personally and as a community. It is a popular conception of justice which is distinct from legal definition. It is what allows us to judge a court decision as "unjust" even though it manifests itself as the embodiment of formal justice. Hence, social justice is motivational. It provides an alternative to the dominant competitive view of human relations based on a model of economic scarcity, dualistic thinking, and crisis orientation.⁵²

Social justice is a comprehensive concept. It encompasses equality but extends beyond it. One problem is that equality is a comparative principle⁵³ while justice provides a non-comparative, inclusive vision. Social justice extends to eliminating domination, oppression and preventing exploitation⁵⁴ and includes other basic human rights. Social justice is a more profound claim than equality, since claims to structural or cultural recognition are usually means to the end of undermining domination or wrongful deprivation.⁵⁵ It could be argued that what counts as equality will depend on how it reflects our conception of what is just.

Social justice goes beyond legal justice. It is clear that legal means alone cannot achieve social justice. Many other formal institutions, including political, economic, and educational ones, as well as informal practices, need to be engaged toward this end. The purpose here is not to privilege the legal approach but, rather, to examine the ways in which law and legal system can be employed toward achieving social justice.

⁵¹Chief Justice Beverly McLachlin, "Forward" *Symposium on the 125th Anniversary of the Supreme Court of Canada*, 80 *Canadian Bar Review* iii.

⁵²E. Franklin Dukes, *Resolving Public Conflict. Transforming community and governance* (Manchester: Manchester University Press, 1996), at 107-118.

⁵³Some of the weaknesses of equality as a concept and legal principle are discussed below.

⁵⁴Some definitions of equality do this as well.

⁵⁵Young, *Inclusion and Democracy*, at 83.

Fundamentally, social justice is an alternative to power as shaping relations within a society. It provides a critical, aspirational concept providing both a vision or outcome of a better society and a means to move toward this goal.

B. Rights: Human and Legal

We are living in the age of the "rights revolution," a revolution characterized by an explosion of rights talk and rights claims.⁵⁶ In particular, the term has been applied to Canada where "never before has rights so monopolized the Canadian language of the public good."⁵⁷ The focus of this "revolution" is the Canadian Charter of Rights and Freedoms (the Charter) and the perceived shift in roles between the courts and the legislatures created by the incorporation of individual and collective rights into the Canadian Constitution. The Charter, however, is only one manifestation of a much larger human rights social movement with many global and local expressions. Indeed, there have been important legal developments on human rights even where there is no constitutional provision for judicial review, for example in France and Australia.⁵⁸

Is it accurate to characterize these developments as a revolution? Others have argued that this shift is characterized more by continuity rather than discontinuity with Canadian legal traditions.⁵⁹

⁵⁶See, for example, Michael Ignatieff, *The Rights Revolution*. 2000 CBA Massey Lectures. (Toronto: Anansi/Canadian Broadcasting Corporation, 2000).

⁵⁷Michael Ignatieff, "Challenges for the Future"(2001), 80 *Canadian Bar Review* 209, at 211.

⁵⁸For a discussion of some of these developments see: Alec Stone, *The Birth of Judicial Politics in France* (Oxford: Oxford University Press, 1992); George Williams, "Judicial Activism and Judicial Review in the High Court of Australia" in *Judicial Power, Democracy and Legal Positivism* 413-428. For an overview of developments in states where there is constitutional provision for judicial review of human rights see David Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1994).

⁵⁹See, for example, Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001), 80 *Canadian Bar Review* 481.

Further, it has been suggested that focusing on this putative "revolutionary" character is unhealthy.⁶⁰

The changing role of Canadian legal institutions on human rights issues is not revolutionary. This assertion is explored in detail in the next chapter. While the growing importance of human rights discourse is not revolutionary from a legal institutional perspective, it may be from a broader, societal one. In this latter sense, the human rights social movement has a revolutionary or transformative potential. The term transformation is preferred over revolution as the former incorporates a sense of metamorphosis from one state of relations to another, rather than the latter's emphasis on complete break from the past. The problem with the revolution metaphor is that it does not admit to the merit of preserving what is valued. However, the two conceptions, transformation and revolution, do share an emphasis on a radical and fundamental degree of change.

The proliferation of rights talk and rights claims does not guarantee the realization of the transformative potential of rights. This potential will only be realized if rights permeate our lives on a day to day basis. Legal institutions have an important role to play in diffusing rights norms throughout society, but they do not work alone in this endeavour. Human rights are legal rights, but they are also more than legal rights.

The following sections explore various conceptions of human rights and perspectives on the dynamics of human rights with a view to setting out the concept of human rights norms that is utilized in this thesis.

(i) The concept of human rights

The idea of human rights is often grounded in a more general or basic understanding of human values or needs. These underlying values and needs include: dignity, autonomy, self-determination, and, more recently, participation. Human rights are specific expressions of these underlying needs. They apply universally within a reciprocal system of rights. They are not dependent on power or

⁶⁰*Id.*, at 482.

status, but rather emanate from our humanness. Human rights are also conceived as "the priority interests to be protected and furthered in a political community".⁶¹ Rights are often referred to as "trumps," since they have the capacity to overcome other interests.⁶² In effect, human rights are an organizing principle that opposes itself to the other main organizing principle which predominates human relations: power.

While human rights have an inherently normative character, the conception of legal rights is much narrower. Legal rights are specific creations of a legal system and relate to a highly specific type of institutional arrangement. Legal rights set out responsibilities to act or not act in a particular way. Legal rights are institutionally enforceable. In liberal rights theory, rights are tangible and determinate. They are objective formal entitlements (usually to the status quo). From this perspective, rights are useful because they can be turned into benefits. Rights are legal entitlements to particular services and conditions with corresponding obligations owed by others.

These distinct conceptualizations lead to a debate over whether human rights are legal rights or some other type of non-enforceable, moral, right. The distinction can be illustrated in the following example: "a moral claim that people have the right to shelter is a claim about the importance of their getting shelter. It is not a claim about the importance of their being assigned shelter in accordance with a specific type of legal or bureaucratic procedure."⁶³ Moral rights and legal rights can be seen as two separate categories, or moral rights can be seen as a moral demand for a legal right. Whether or not human rights are legal rights is often reduced to a question of whether or not they are justiciable, that is whether they can found an action in the courts.

⁶¹Tom Campbell, "Democratic Aspects of Ethical Positivism" in *Judicial Power, Democracy and Legal Positivism* 3-36, at 25.

⁶²Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977); and "Rights as Trumps" in *Theories of Rights* ed. Jeremy Waldron (Oxford: Oxford University Press) 153-167.

⁶³Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 *Oxford Journal of Legal Studies* 18, at 25.

The import of these differing conceptions of rights is highlighted in considerations of social and economic rights, which many people accept as "human" rights but not as "legal" ones in the sense of being justiciable. This perception ignores the fact that there has been a long history of social and economic rights in law. For example, England had 500 years of poor laws which were clearly precursors to 20th-century social rights, including minimum wage laws which were first passed in 1604.⁶⁴ Clearly, the subject matter entailed by human rights can be the object of statutes and common law and hence are justiciable.

Rights have a paradoxical nature. On the one hand, a right is a phenomenon of the highest importance in that it cannot be refused even if it sometimes calls for drastic change in the way society runs.⁶⁵ On the other hand, the function of rights has often been as a tool of social control in reinforcing the status quo or keeping change within acceptable limits. This paradox is explored in the next section on the critique of rights.

(ii) The critique of rights

One of the main arguments against human rights is that they have no inherent meaning: they are fundamentally indeterminate. This inexact quality is true to some extent for all legal rights. However, the breadth of potential meanings is greatly enlarged with human rights. It is this indeterminacy that causes the difficulty, complexity and controversy attending the idea of basic rights.⁶⁶

... despite the ever increasing role of the concept of human rights in world politics and the undeniable importance for any political system to identify the priority of human interests that require to be defended and promoted, the powerful philosophical arguments against the

⁶⁴Somers, at 80.

⁶⁵L.M. Friedman, "The Idea of Rights as a Social and Legal Concept" 27 *Journal of Social Issues* at 192.

⁶⁶Waldron, at 19.

existence of any privileged knowledge of what their rights might be, both in content and form, have not been adequately answered.⁶⁷

Human rights are central but also inherently controversial. There is a diversity of approaches to interpreting human rights and agreement in principle does not mean that there will be agreement on their application in a given situation. This focus on indeterminacy reveals that rights are political. From a strict liberal-positivist, the conclusion is that human rights are therefore outside the province of the law.

A second problem raised by the language of rights is that it results in the creation or perpetuation of victim/perpetrator relationships. This situation appears to be the inevitable outcome inherent in the assertion of a right. For example, when asserting an equality right "the negative language of being discriminated against requires a complainant seeking a remedy to occupy the subject position of a victim in order to make out a persuasive case."⁶⁸ This is also true of those asserting other human rights, for example, that they have been deprived of their freedom of expression or that their right to a fair trial has been infringed.

A third concern is that the formulation of rights is inherently individualistic and ignores the relational and collective aspects of social life. From this perspective, the broad community is no longer perceived as the focus of public action because the focus is increasingly shifting to the individual. Rights talk enhances rather than reduces this concern:

The individual moreover, increasingly is being seen not simply as an actor in the broad, social-political debate on the public issues of the day, but as the fundamental centre of society, around whom all public policy must orbit. And furthermore, the individual now is a bearer of fundamental rights. He or she possesses legal entitlements that all other individuals must respect and that all governments must protect and promote. Certain of these

⁶⁷Campbell, at 25.

⁶⁸Margaret Thornton, "Citizenship, Race and Adjudication" in *Judicial Power, Democracy and Legal Positivism* 335-353, at 346. See also, Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988).

rights - such as fundamental human rights- inhere in individuals simply because they are human beings; other rights - such as rights in criminal law, labour and worker's compensation law and environmental law - arise through the creation of statutes designed to promote the interests of citizens. Regardless of the legal justification or origin of the right, the result is the same: an individual who possesses a legal entitlement to a particular freedom, privilege, service or condition, and who can demand that all others respects, honour and serve that right...normally viewed in absolutist terms.⁶⁹

The overarching concern is that we are witnessing the growth of a legalistic approach to the public good. The predominance of rights talk has shifted public policy: the language of public interest, collective responsibility and the common good is replaced by the language of individual rights, individual interests and public obligations to legal entitlements.

The concern that rights talk emphasizes the individual over the collective is also raised in a second sense, that of cultural diversity. Human rights, as generally conceived, are too narrow to address collective concerns that the minority is facing some sort of unfair disadvantage. These can only be rectified by a group-differentiated rights. For example, through the supplementation of traditional human rights doctrines with theories of minority rights⁷⁰ or aboriginal rights.⁷¹

A more radical critique focuses on the false role of rights in appearing to protect all individuals while acting in the legitimation of domination, especially through the protection of property interests. There are two broad lines to this critique of rights theory. The first line is the indeterminacy

⁶⁹R.Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000), at 150-1.

⁷⁰Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (London: Oxford Press, 1995).

⁷¹See for example, Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in *Locating Law: Race/Class/Gender Connections* (Halifax Fernwood Publishing, 1999); "Aboriginal Women and Legal Personhood: Lessons in Activism" (paper presented at West Coast LEAF national forum on *Transforming Women's Future: Equality Rights for the New Century* Vancouver, British Columbia, 4-7 November, 1999); Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1991) 6 *Canadian Journal of Women and the Law* 174. For an introduction of the changing international human rights framework to integrate the rights of indigenous persons see Sharon Helen Venne, *Our Elders Understand out Rights. Evolving International Law Regarding Indigenous Rights* (Penticton, BC: Theythus Books Lt., 1998).

argument, focusing on the absence of a relationship between a right and a "right" outcome. The second line is the "consciousness" argument, emphasizing the production of a false vision of reality.⁷²

These broad lines are filled in by Tushnet's critique of rights.⁷³ He has four main criticisms of rights. Firstly, rights are unstable: they are relatively difficult to find except in a specific setting. Secondly, rights are indeterminate: it is difficult to know what the outcome of a specific right will be. This indeterminacy is two fold for it comprises both technical indeterminacy (the process of balancing interests and rights in judicial choice) and fundamental indeterminacy (the substance of the very ideas such as liberty are not tied to any particular outcome). Thirdly, rights lead to reification: turning the actual experience into an empty abstraction. Politics is preferred because it preserves the real experience rather than filtering it through the language of rights. Fourthly, and perhaps most importantly, rights discourse impedes advancement because it is at the least not useful, and at the worst, harmful, to the process of radical social and political change.

Similar critiques have been made in the Canadian context. Here, it is argued that progressive conceptions of social justice cannot be advanced through Charter rights because they are unable to overcome relations of power and their manifestations in societal structures and institutions.⁷⁴ For example, Bakan has argued that the Charter equality rights are unlikely to have a substantial effect on social inequality in Canada because the Supreme Court of Canada's interpretation of them, though presented in broad and substantive terms, embodies anti-statism (rights protecting individuals from

⁷²Allan Hutchison and Patrick Monahan, "The "Rights" Stuff: Roberto Unger and Beyond" (1983) 62 *Texas L. Rev.* 1477.

⁷³M. Tushnet, "Critique of Rights" (1983) *Texas L. Rev.*

⁷⁴See, for example, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997); Harold Glassbeek, "From Constitutional Rights to 'Real Rights' - R-i-ights Fo-or-ward Ho!?" (1990), 10 *Windsor Yearbook of Access to Justice* 468; Allan Hutchison, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

interference by the state) and atomism (rights as belonging to individuals (or groups) with other individuals (or groups), institutions or agencies having corresponding obligations.)⁷⁵

iii) **Reconceiving Rights**

The extent of concerns as expressed across a spectrum of political and philosophical perspectives underscores the need for a fundamental rethinking of the concept of human rights, particularly as it relates to the pursuit of social justice. This rethinking could lead to abandoning the concept of human rights and replacing it with alternative legal-analytical frameworks that could shape the quest for social justice through legal means. Alternatively, it could lead to an acknowledgement of the limitations of the concept but in deference to its practical value, circumscribe the rethinking to a clarification of the role and potential of human rights. Finally, these concerns could be addressed in a substantial and principled way through a reconception of the concept of human rights.

In my view, the problems identified above are not inherent in the concept of rights, but rather derive from a limited conception of rights rooted in liberal doctrine. It is not so much that liberal theories of rights are wrong rather that they are incomplete, but are nevertheless accepted as a full explanation of the nature and role of rights. Therefore it is not a question of abandoning liberal rights theory, but supplementing it with other ways of seeing rights. Rather than relinquishing rights, the focus should be on reconceiving them as a social practice geared toward achieving social justice. This project is well underway. There is a time-lag between the way human rights are conceived and discussed which continues to be informed by an outmoded debate framed by liberal theory and the practice of human rights which is evolving at a rapid pace.

Human rights developments over the last two centuries are often described in terms of generations of rights: from civil rights to political ones in the first generation with their focus on liberty; to

⁷⁵Bakan, at 45.

social, economic and cultural rights in the second generation with the focus on equality; and more recently, an emerging third generation of communal rights to development, peace, critical education and so on.⁷⁶ Conceptualizing the evolution of human rights norms in terms of generations assists us in tracing their development. However, it can also mask the united foundation of all human rights norms: the equal dignity, respect and autonomy of all human beings. Human rights law can be seen as successive interpretations of that underlying norm and how it can best be attained.

The next sections elaborate the broader conceptualization of human rights norms utilized in this thesis. It is proposed that rights are inherently transformative and should be conceived as a broad social practice in which individuals and groups interact to define and actualize rights. Rights norms are fundamental concepts that help to structure and frame the negotiation of meaning and action. This conception of rights is further elaborated in relation to two contemporary discussions: the relationship between rights and culture and rights and citizenship.

a. Rights as Inherently Transformative

There has been an important shift in the conception of human rights norms over the last five decades. Historically, law and even supreme laws in the form of constitutions have been characterized as codifying rights that have developed over time. In this sense, rights have had a retrospective character. However, today's conception of human rights is more accurately defined as a prospective one. Rather than codifying broadly understood principles, rights are a departure point for change. They are inherently transformative.

Not everyone subscribes to this understanding of rights. For example, many criticize the Charter as

⁷⁶K.Vasak, "A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the United Nations Declaration of Human Rights," *UNESCO Courier* (Nov. 1977) 29-32, referred to in R.P. Claude and B.H. Weston, "International Human Rights: Overview" in *Human Rights in the World Community - Issues and Actions* 2d ed. (Philadelphia: University of Pennsylvania Press, 1992). Habermas defines these three generations differently: liberal formal rights, social welfare rights and procedural rights.

embodying liberal values.⁷⁷ However, the Charter enshrines a number of rights that present a departure from liberal rights thinking. These departures include collective and social rights such as: language rights, multicultural rights, aboriginal rights, equality rights and gender equality rights.

The Charter is a document which enshrines both traditional rights and rights whose content is unascertainable at the present time. This dual nature opens up the possibilities of recognizing social, economic and communal rights which could have transformative potential. In particular, the Charter can be favourably compared with the American constitution which is an inherently negative rights document.⁷⁸ Habermas contrasts the American Bill of Rights, which is inherently conservative because it is a mere inventory of existing rights of a society of proprietors with the French *Declaration of the Rights of Man and the Citizen* which is revolutionary in potential because it asserts a new system of rights.⁷⁹ Just as the latter encompasses the potential for "liberative jurisprudence", so too does the Charter give rise to the possibility of social transformation.⁸⁰

⁷⁷See, for example, Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of the Charter to Further Feminist Struggles" (1987) 17 *International Journal of Society & Law* 445; "Labour, the New Constitution and Old Style Liberalism" (1988), 15 *Queen's Law Journal* 1; and "What do we mean by Law and Social Transformation?" (1990), 5 *Canadian Journal of Law & Society* 47; Allan Hutchison and Andrew Petter, "Private Rights and Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *University of Toronto Law Journal* 278.

⁷⁸Mark Tushnet, "Critical Legal Studies and Constitutionalism: An Essay in Deconstruction" (1983) 36 *Stanford Law Review* 626.

⁷⁹J. Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1974) at 89-93.

⁸⁰As noted above the Charter contains collective rights that by definition impose positive obligations on governments. To date, this "liberative" or transformative nature has been developed the most forcefully under the official language minority rights provisions in ss.16-23 of the Charter. Where, for example, *R. v. Beaulac* [1999] 1 S.C.R. 768, the Supreme Court of Canada stated that governments are obliged to do all that is "practically possible" to ensure minority language rights (at para. 24).

At the same time it is important to note, that the courts have not been as open to transformative interpretations of other Charter provisions. For example, there has been little success to date in integrating social and economic rights into the Charter. For a discussion of this issues see, Martha Jackman, "What's Wrong With Social and Economic Rights" (2000), 11 *National Journal of Constitutional Law* 235; "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights* Review" (1999) 14 *Journal of Law & Social Policy* 69. The difference between the experience with the language rights and equality rights may be attributed, at least in part, to the specificity of the language rights provisions. The Charter's lack of specificity with regard to social and economic rights has resulted in calls for an additional human rights agreement that would set out these rights in greater detail. For a discussion of this point see, for example, P. Browne, ed., *Finding Our Collective Voice: Options for a New Social Union* (Ottawa: Canadian Centre for Policy Alternatives, December 1998); J.Bakan

The formulation of human rights and related doctrine should be maintained because of the validity of normative and programmatic argument. The idea of law as a social learning process which is spurred on by the dialectic between facts and norms can be further refined with respect to the role of rights in legal and political discourse. Rights bring three benefits to this dialectic: the attempt to cross both the empirical and normative frontier; the willingness to recognize and develop disharmonies of law (principles, counter-principles); and the potential to integrate into standard doctrinal argument the explicit controversy over the rights and feasible structure of society.⁸¹

Attaining the transformative potential of human rights norms requires us to reconceptualize rights. Rights should not be thought of as "things" or "goods." Rights are not finite, but rather they have an open-ended quality. It is also essential that the illusion that the right can create the experience of the rights itself must be dispelled.⁸² Whereas under liberalism, rights reflect social order, here they rise above the social order.⁸³ In effect, human rights norms provide a blueprint for a new normative order:

and D. Schneiderman, eds., *Social Justice and the Constitution - Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

In general, the transformative potential has been assisted by the purposive approach to Charter interpretation that has been developed by Canadian courts. One clear statement of this approach was made by Chief Justice Dickson in his dissent in *Reference re Public Service Employee Relations Act* [1987] 1 S.C.R. 313 at 360:

The Constitution is supreme law. Its provisions are not circumscribed by what the Legislature has done in the past, but, rather, the activities of the Legislature -- past, present and future -- must be consistent with the principles set down in the Constitution.

A purposive interpretation is aided by reference to: "the cardinal values and purpose of the guarantees", the specific wording of the Charter provisions, the larger objects of Charter and the purpose of other relevant Charter rights.

⁸¹Roberto Unger, "The Critical Legal Studies Movement" (1983), 96 *Harvard Law Review* 563, at 577.

⁸²P.Gable, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" 62 *Texas L.Rev.* 1563, at 1598. See also Stuart Scheingold, *The Politics of Rights, Public Policy and Political Change* (Yale University Press, 1974).

⁸³Unger, "The Critical Legal Studies Movement," at 585.

An imposed normative order has been the social reality: it is now the task of positive law to restructure these relationships according to the requirements of personal freedom and dignity.⁸⁴

Put another way, human rights norms require the "transformation of culture."⁸⁵

Another aspect of this transformation is a shift away from viewing rights as zero-sum, what you receive takes away from another, to non-zero-sum, where the potential gain of the realization of rights is the benefit of all. This shift is from an individual understanding of rights to a communal one. The latter can be described as "rights that, standing alone, do not require a choice between our own well-being and the well-being of another".⁸⁶ It could be argued that the very idea of a right denies that it has anything to do with a zero-sum situation.⁸⁷ Thus, Marx, contrasted *droit de l'homme* and *droit du citoyen*, since the latter type of rights could only be exercised in community with others.⁸⁸

Nothing is inherently either a communal or an individual right, for the two are not opposites. Freedom and equality can both be seen as individual or communal rights. The difference is the way in which the abstract right is defined and experienced, as a right against something or as a right in relation to others.

⁸⁴Murphy, at 53.

⁸⁵Roger Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Bloomington: Indiana University Press, 1999). While Levesque's focus is on children's rights, he makes this statement in general terms with respect to all human rights norms.

⁸⁶S.Lynd, "Communal Rights" 62 *Texas L. Rev.* at 1420. See also Sparer, "Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the CLS Movement" (1985) 36 *Stanford L. Rev.* 509.

⁸⁷Friedman, at 194.

⁸⁸K.Marx, "On the Jewish Question" *Early Writings*, at 211.

b. Rights as a Social Practice

Human rights are not concrete, they are a social practice. They are spring up fully-formed with an independent and indefinite existence, rights are defined in the interactions between individuals, groups and institutions involved in the practice of human rights. Rights are "free-floating cultural and institutional resources that must be appropriated and in turn given meaning only in the practical context of power and social relations."⁸⁹ No matter how powerful a right appears in the abstract, what matters is who actually benefits from it and how.

Seeing rights as a social practice places a renewed emphasis on rights as inherently relational:

What does distributing a right mean?...Rights are not fruitfully conceived as possessions. Rights are relationships, not things, they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action.⁹⁰

Rights shape human interactions but are also being shaped by them. The term human rights practices is preferred because it better reflects the dynamic qualities of rights as process: as states of becoming rather than states of being. This conception of human rights incorporates the dual conception of law as simultaneously a social practice and a body of doctrine.⁹¹ While many theorists focus on the word or doctrine of the law as a concrete result, it too is more aptly thought of as an ongoing discourse or discursive practice. This reconceptualization responds directly to the indeterminacy thesis and indirectly addresses the concerns over victimization and over-emphasis on the individual. It highlights the active participation of individuals and groups in interactions that take general rights norms and gives them a coherent meaning and impact within a specific context.

⁸⁹*Id.*, at 79. See also Hendrik Hartog, "The Constitution of Aspiration and the 'Rights that Belong to Us All'" (1987) 74 *American History* 1013.

⁹⁰I.M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 25.

⁹¹Nicola Lacey, "Feminist Perspectives on Ethical Positivism" in *Judicial Power, Democracy and Legal Positivism* 89-114, at 109.

It is possible to reconceive rights in a way that transcends the dichotomy established by the supporters and detractors of human rights. Rights are neither as static or concrete as idealized by rights-supporters, nor are they as malleable and subject to political circumstance as posited by their detractors. There is something inherent in the idea of human rights norms that assists in the framing of discussions on their meaning and implementation. In the parlance of the social transformation model posited above, human rights frame the development of an alternative view of the world, they are the ideal norms which society is seeking to achieve. Human rights norms provide the framework within which human rights practices operate to provide further interpretation and application in concrete, relational settings.

Human rights practices are not goods that can be seen in stark either/or, win-lose, individual or communal terms. Rights are cultural and institutional resources that are given meaning through social practice. These practices are inherently transformative because they are relational and have a prospective rather than a retrospective focus. This conceptualization of human rights norms can be further refined by relating it to two current discussions on rights practices. These discussions center on the relationship between rights and culture on the one hand, and rights and citizenship, on the other.

c. Rights and Culture

The concept of human rights has also been challenged as a culturally encapsulated notion developed in the context of Western-style capitalist democracies. From this perspective, the central questions are: whose norms are these? are they relevant in all cultures? At the international level, this discussion is often framed as an issue of whether or not human rights norms are universal. While there are important differences in approaches to and understandings of human rights and their role within different societies, forms of rights and rights practices exist in all major cultures.⁹²

⁹²For an excellent overview and discussion on this point, see Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff Publishers, 2001). In particular, she describes in detail three "non-western" approaches to human rights: Asian, Islam and African.

Moreover, scholars have demonstrated how the universal/cultural relativism debate played out in international human rights fora is best characterized as a power struggle between North and South or West (Occidental) and East (Oriental) rather than by a desire to address issues of cultural diversity in human rights discourse.⁹³

In the terms of this thesis, the relationship between rights and culture is seen in different terms than this international debate. Here, rights norms are seen to have the potential to transform culture and power relations so as to achieve social justice. The human rights of many groups, particularly vulnerable groups such as women and children, have been violated in the name of culture. The relationship between rights norms and cultural norms is a dialectical rather than a conflicting one. Rights norms can be employed to challenge problematic cultural practices, but culture also informs human rights practices so as to ensure that they are relevant to a given a community.

The need for this type of reconciliation between rights and culture, or the universal and the particular, is recognized by Dianne Otto who has argued for a new form of universality understood as a dialogue and ethical struggle.⁹⁴ Her approach involves moving beyond the stagnant universalism/cultural relativism debate that has hampered international discussions and poses an obstacle to progress toward global justice and consideration of important issues of global diversity.

She suggests that rather than addressing "the imponderables of the relationship between local and global knowledge by searching for an absolute statement, the relationship should be recognized as one of the productive intersections which are integral to transformative dialogue."⁹⁵ She employs Chantal Mouffe's view that in this process "[u]niversalism is not rejected but particularized."⁹⁶

⁹³See for example, Dianne Otto, "Rethinking the "Universality of Human Rights Law" 29 *Columbia Human Rights Law Review* 1 (1997) at 6.

⁹⁴Otto at 31-36.

⁹⁵*Ibid*, at 35.

⁹⁶Chantal Mouffe, "Radical Democracy: Modern or Postmodern?" in Andres Ross (ed.) *Universal Abandon? The Politics of Postmodernism* (1988) 31, at 36.

From this perspective, universality is understood as dialogue between competing ideas about human rights norms in which local knowledge with respect to implementation is privileged. Local knowledge is not just defined territorially, rather it is based on the experience and reflections of the group most affected by the violation. Within Canadian law, this idea has evolved through the doctrine and practice of "contextualizing" equality claims.⁹⁷ The key is to understand rights violations in the context of dominant power relations rather than a sameness/difference cultural framework.

This approach to the global/local dialectic on human rights norms accepts that every society will not, and need not, settle on exactly the same conception of vital human interests.⁹⁸ At the same time, it does not mean abandoning universalism nor leaving local culture unexamined. Rather, it is a dialectic whereby "within its inherited traditions, every country must now evolve in a context marked by the globalization of legislation, in particular on human rights."⁹⁹ Local transformative human rights practices are framed and informed by universal human rights norms. The recent work of indigenous peoples to develop international human rights instruments that respect their worldview is an excellent example of the potential of human rights concepts to meld the universal and the particular in a way that is transformative of relations rather than one that imposes a normative order thereby furthering domination.

The types of transformative human rights practices developed in this thesis aspire to promote this dialectic between rights and culture. In order to realize this potential, rights must be understood in relational terms and in the context of structural inequalities. While rights norms are rooted in human dignity and respect for the individual as an individual, they must also encompass the fundamentally

⁹⁷See discussion in the next section on the right to equality and in Chapter 6.

⁹⁸Daniel Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue" (1996) 18 *Human Rights Quarterly* 641 at 667.

⁹⁹Pierre Truche, "Selected Considerations Anchored in the Universal Declaration of Human Rights" in R.V. Van Puyembroeck (ed.), *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington, DC: The World Bank, 2001), 3 at 9.

social and relational nature of humanity. Rights must take into full account the individual as a member of the social group of which she or he is a part. Societal structures and culture are both fluid and patterned. These relationships and structures can both act to infringe human rights and are an essential part of the solutions to rights violations. Given this dual nature, the relational aspect of human rights issues must be seen within the intersecting and shifting positions of domination and subordination. This understanding is further refined in other parts of this thesis.

However, this thesis should not be read as proposing that legal approaches to human rights are the only valid or the best approach to achieving social justice in all circumstances. Law, and in particular, human rights norms, can promote a questioning of existing cultural norms, institutions and practices. They can also inform the reconceptualization of these cultural norms, social practices and institutions in a manner that is consistent with human rights to dignity and equality. While the focus in this thesis is on human rights discourse, this discourse is not an exclusive one, nor should it be seen "as displacing other discourses based on needs, obligations, community, empowerment, ethics, economic justice, and material equity."¹⁰⁰ These extralegal local languages retain their importance in working toward social justice. It is important to avoid displacing nonlegal local mechanisms that also protect and promote human dignity.¹⁰¹

c. Rights, Citizenship and Personhood

Perceived problems with the concept of basic human rights have also spurred on a revival in social justice claims based on the concept of citizenship. This development does not really avoid rights, rather it changes the characterization of rights. Instead of basing them on basic human values or needs, they are based on the status of an individual as a citizen.

In the 19th and early 20th centuries, citizenship was seen in shallow terms, mimicking rather than

¹⁰⁰Otto at 43.

¹⁰¹*Ibid*, at 43.

escaping approaches to rights. It was also based on formal civil rights and limited to a concern for individual liberty. Arguably, the emphasis on human rights developed as an alternative and perhaps in reaction to these limitations on what was meant by citizenship. It was in effect a move from status to rights.

A groundbreaking work by Thomas Marshall published in 1950¹⁰² expanded and redefined citizenship "away from solely a narrow concept of formal individual liberties to one that also embraced social and economic rights."¹⁰³ This bundle of rights attaches to persons through what Marshall calls the "status" of citizenship. Marshall described citizenship as a status that counteracts the inequalities that a market economy generates and legitimates. Thus we have moved from status to rights and back to a broadened conception of status. Marshall's work has witnessed a resurgence of interest recently. Citizenship is seen by Margaret Thornton and others, as providing an alternative to rights and another way of rethinking the status of a subordinated people.¹⁰⁴ This reformulation has its roots in Kant's idea of active citizenship and passive citizenship.¹⁰⁵

Thornton has demonstrated how the assertion of rights is assumed to be the prerogative of the "benchmark man", the paradigmatic rights-bearing citizen who epitomizes active citizenship. Because the legal system has privileged the "benchmark man" as the model active citizen "those who

¹⁰²Thomas Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950), reprinted with a lengthy introduction by Tom Bottomore *Citizenship and Social Class* (Concord, Mass: Pluto, 1992).

¹⁰³Somers, at 67.

¹⁰⁴Margaret Thornton, "Citizenship, Race and Adjudication," Campbell and Goldsworthy, 335-354; "Embodying the Citizen" *Public and Private: Feminist Legal Debates* ed. M. Thornton (Melbourne: Oxford University Press, 1995); "The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage" (1997) 24 *Journal of Law and Society* 486. See also essays in *Citizenship in Feminism: Identity, Action and Locale* (1997) 12 *Hypatia* (special edn.).

¹⁰⁵Kant identifies the attributes of a citizen as **freedom** (obedience to a law predicted on a person's consent to it), **equality** (between citizens) and **independence** (based on the exercise of autonomous choice. These three concepts also underpin that of civil personality and allow citizens to pursue their rights juridically. Passive citizens are ones who lack "civil independence" or agency (for Kant this included all women, minors, and men without agency (domestic servants and apprentices). Immanuel Kant, *The Metaphysics of Morals* trans. Mary Gregor (Cambridge: Cambridge University Press, 1991). See discussion in Thornton, "Citizenship, Race and Adjudication", at 336.

are not white, able-bodied, heterosexual, middle class and who espouse a mainstream religion and right of center politics" have been relegated to passive citizenship or in Kantian terms to "mere underlings of the commonwealth".¹⁰⁶ In particular, she has shown the ways in which the political, economic and legal systems have "erased the voices of poor and subordinated peoples, as well as women, from the meaning of active citizenship".¹⁰⁷

Rather than accepting this traditional concept of active citizenship, it can be reframed. Recent formulations suggest that the assertion of full citizenship by those traditionally conceived as passive citizens becomes an alternative way of making claims toward social justice. Participation in litigation is one way to effect the transition from passive to active citizenship.¹⁰⁸

In the Canadian context, a comparable approach has been developed by Kathleen Lahey who places human rights in the context of the search for legal and constitutional personhood.¹⁰⁹ This framework is particularly resonant within Canadian legal culture because of the almost mythic quality of the 1925 decision of the Judicial Committee of the Privy Council in the *Persons case*.¹¹⁰ Legal personality is one well-established strategy for safeguarding essential status.

¹⁰⁶"Citizenship, Race and Adjudication", at 336.

¹⁰⁷*Id.*, at 339.

¹⁰⁸*Id.*, at 337. Thornton recognizes that formal litigation is the best way to achieve this but that the "act of asserting a legal right is an important symbol of active citizenship".

¹⁰⁹This is the approach developed by Kathleen Lahey in "'Legal Persons' and the Charter of Rights: Gender, Race, and Sexuality in Canada" (1998) 77 *Canadian Bar Review* 403 and *Are we persons yet?* (Toronto: University of Toronto Press, 1999). Lahey's sees the removal of barriers to civic capacities or the attainment of full 'legal personality' (civic capacities) as the first step toward attaining legal equality, and perhaps even social, economic and political equality for any group. She applies this framework of analysis to reveal the continuing legal disabilities experienced by sexual minorities (lesbian, gay, bisexual, cross-dressing, transgender and transsexual people) in her book, and also to women and racialized individuals and groups (including, Aboriginal people and foreign domestic workers) in her article.

¹¹⁰*Edwards v. A.G. (Canada) (Persons Case)*, [1930] 1 D.L.R. 98 (J.C.P.C.). This decision reversed the Supreme Court of Canada's decision in *Reference as to the meaning of the word 'persons' in section 24 of the British North America Act, 1867*, [1928] SCR 276, and upheld the view that women were indeed "persons" under the Canadian Constitution for the purposes of appointment to the Senate.

One of the virtues of shifting to a focus on citizenship or personhood is the focus on active participation which is unencumbered by the language of victim which characterizes some rights discourses. Rather, it is through "active manifestations of citizenship" in litigation that identity can be "actively created and recreated" so that "victimhood is moderated by struggle, strength and courage":

The result is not a neutralized and anodyne notion of identity but one that is dynamic and variegated. Through the dialectical re-creation of identity, citizenship can be understood anew, not just as a bland universal, devoid of variation, as conventionally imagined by law and liberal theory, but as a site of action, of performance.¹¹¹

The emphasis on agency and participation is particularly important in the construct of human rights discourse in the public sphere introduced later in this thesis.

Another virtue is that citizenship encompasses the principle of equality in a fundamental way. That is: "the universality of citizenship within liberal theory assumes that there is an equal apportionment of rights and responsibilities between all citizens."¹¹²

A third advantage is that citizenship encompasses the idea of social rights. Marshall demonstrated how the three elements of citizenship must stand together: civil and political rights must be supported by social rights, otherwise the 'three-legged stool of citizenship' will be unbalanced.¹¹³

Despite these apparent advantages, it is unclear whether status-based concepts such as citizenship or legal personality really overcome or abandon the limits of human rights concepts. Citizenship is problematic in that it excludes members of society who are not citizens.¹¹⁴ Another concern is that

¹¹¹Thornton, "Citizenship, Race and Adjudication", at 343.

¹¹²Somers, at 65.

¹¹³Twine, at 104.

¹¹⁴For example, landed immigrants, resident foreign workers and potentially, children.

it focuses on the dyad between the individual and the state and does not appear to be applicable to other relationships such as those that exist amongst individuals and between individuals and corporations.

Some conceptions of citizenship shift away from status and back towards rights. It is argued that rather than being a category of social status, the rights of citizenship or personhood "comprise a bundle of enforceable claims that are variably and contingently appropriated by members of small civil societies and different legal cultures - albeit defined within a territorially defined nation state."¹¹⁵ The idea of citizenship is a 'contested truth' in the same way that the right to equality may be.¹¹⁶ Thus rather than replacing rights, citizenship shifts these claims from the universal claims based on humanity to local claims based on community.

Framing rights in terms of broader claims to citizenship or personhood have important advantages which should be imported into a reconception of rights. These are: the focus on active participation; asserting positive claims to rights rather than relying on negative claims of deprivation; and the integration of equality and social rights in a fundamental way.

This section has developed a renewed conception of human rights norms that will inform the remainder of this thesis. Rights norms are concepts of vital interests that recognize and promote equality and human dignity and can shape social practices leading to the further definition and actualization of rights in specific contexts. Rights are inherently transformative because they embody an aspirational normative order that is by definition prospective. The outcome of these practices are not foreseeable because transformation takes place through a evolutionary dialectic between the human rights norms and the factual experience of human rights violation. Rights will always be beyond our capacity to fully implement since the synthesis of the normative and factual

¹¹⁵Somers, at 79.

¹¹⁶*Id.*, at 65.

orders will inevitably give rise to a more profound understanding of human rights as well as a more nuanced sensitivity to the unfinished project of the full enjoyment of rights.

There is no one universal conception of how vital human interests can be protected and promoted. However, all human rights approaches share a common normative basis rooted in respect for humanity seen in relational terms. Rights norms and cultural norms form a second dialectic in which general universal human rights norms both challenge and are informed by cultural norms. The universal/particular dialectic emphasizes the underlying nature of rights as emerging through social practices rather than through received doctrine.

This reconception of human rights is robust and is not easily displaced by other status-based conceptualizations of vital interests. However, in some circumstances, the efficacy of human rights practices can be enhanced through the linking of the concept of rights with status arguments based on citizenship or personhood.

This conceptual discussion of the nature of human rights seen as social practices is made more concrete in the following discussions on the dynamics of these practices and the specific examples of the right to equality within the Canadian context.

(iv) The dynamics of human rights practices

Substantive rights are set out in the Charter and other human rights instruments in a declaratory fashion, as if they in fact existed. However, nothing could be further from the truth. Rather than an existing state which should not be derogated from, rights are aspirational. They are goals that as a society we aim to progress towards. It is this aspirational character that imbues rights with a transformative potential. Human rights encompass both a statement of an alternative reality that we seek to achieve and a means to achieve these goals.

Human rights declarations provide a statement of a powerful and important human consensus about the dignity that must be accorded all human beings and about the willingness of human society of respect the basic rights of all.¹¹⁷ However, these statements are incomplete and therefore rights should be seen as an open-ended project.

The history of human rights can be seen as two streams: (1) the struggle to name previously unnamed rights and to gain their acceptance as human rights and (2) the ongoing struggle to ensure the enforcement of human rights. This dynamic characteristic is what makes human rights a powerful tool for promoting social justice:

- if the right is not recognized the struggle is to assure recognition
- if the right is not respected the struggle is to assure enforcement
- the process of gaining recognition of a right leads to better enforcement and the process of enforcing leads to greater recognition of the rights.¹¹⁸

This in turn leads to greater concretization of rights in legal covenants, declarations and legislation.

This dynamic has also been described as the "principle of the ratchet,"¹¹⁹ the goal is to secure agreement on a particular form of words or course of action, and then try to use this as a foundation for another step forward whenever the opportunity arises. Once this broader interpretation and application of a human rights norms is accepted, further steps are taken to move it up another "notch," and so on.

¹¹⁷Women, Law & Development International and Human Rights Watch Women's Rights Project, *Women's Human Rights Step by Step* (Washington: Women, Law & Development, 1997), at 10.

¹¹⁸*Ibid.*

¹¹⁹Michael Banton, "Decision-Taking in the Committee on the Elimination of Racial Discrimination" in *The Future of UN Human Rights Treaty Monitoring* eds. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), at 68.

The function or operation of human rights is often seen in fairly narrow terms. For example, as a measure or standard to be used by courts in resolving disputes. However, human rights are not limited to their justiciable qualities. While rights undoubtedly have an important role in judicial decision-making leading to the formulation of a remedy, this is not the only, or perhaps not even the primary function of human rights. There is always a gap between the entitlement of individuals to specific rights and the limited procedural capacity of individuals and groups to protect, promote and enhance their rights. It is the practice of human rights that attempts to bridge the gap between abstract norms and the experience of those norms.

One aspect of an examination of the human rights practices is the dichotomy between direct and indirect application. A conclusion as to whether or not human rights have a functional or practical value often depends on an analysis of the operation of enforcement mechanisms. For example, international human rights are generally taken to be hampered by the weakness of enforcing institutions and procedures, whereas domestic constitutional rights are seen as strong since they are directly enforceable through legal or political institutions. However, this dichotomy between direct (strong) enforcement and indirect (weak) enforcement is a problematic one.

Commentators often play down the significance of the cooperative and educational approaches to enforcing human rights norms. For example, international human rights instruments may appear weak but they can be a major weapon in the struggle to ensure human rights.¹²⁰

Human rights treaties seemingly function best indirectly - they offer norms that are comprehensible and flexible yet rigid enough to provide the international community some basis on which to constrain governments that circumvent internationally recognized standards, to push, prod, and embarrass them into taking steps.¹²¹

¹²⁰Kevin Jackson, *Charting Global Responsibilities: Legal Philosophy*. Lanham, MD: University Press of America, 1994); Ann Fagan Ginger, "The energizing effect of enforcing a human rights treaty" (1993) 42 *DePaul Law Review* 1341.

¹²¹James W. Nickel, "How human rights generate duties to protect and provide" (1993) 15 *Human Rights Quarterly* 77, at 82.

Another problem is the tendency to focus narrowly on the roles and responsibilities of state and state actors in the implementation of rights. The focus of rights guarantees is often on state action or the lack thereof, and on the relationship between citizen and state. However, the actions of non-state actors can be as important in the protection and promotion of rights. Much of the concretization of rights involves the application of general principles to particular circumstances with individuals making situation-specific judgments about how to interpret and apply general human rights norms or principles.¹²² These types of judgments can be made even in the absence of a consensus on the general meaning of a given right or principle.¹²³

While there is nothing inherently wrong with current mainstream views of the function of human rights, they are unnecessarily limited. Viewing human rights as a social practice leads to a broader, more varied view of the dynamics of their enforcement.

Human rights norms are a supportive source for conceptualizing and enacting reforms. They not only have a role in resolving disputes but more importantly they provide methods of deliberation and accommodation. Norms must be clear enough to constrain states and other actors but also must remain flexible and adaptive if they are to effect social change. Indeterminacy and flexibility do not inevitably result in paralysis. Rather, these qualities simply underscore the importance of the practices and institutions through which the interpretation and implementation of human rights is pursued.

What benefit does a human rights perspective bring? Viewing social problems in the context of rights is important because it requires us to rethink how social institutions operate. It renders the invisible underlying beliefs and problematic practices, visible. While a narrow vision of a given right can constrain our vision of social justice, at least temporarily, the practice of looking at an issue from a rights perspective qualitatively changes the nature of the discussion. For example, while a

¹²²Young, *Inclusion and Democracy*, at 29.

¹²³*Id.*, at 43.

narrow construction of women's equality rights in a case dealing with benefits for pregnant workers initially harmed rather than advanced the cause of equality in the workplace, it contributed to more profound discussions of these issues and was eventually replaced by a very broad interpretation and application of the right to equality in this context.¹²⁴

Human rights practices promote discussion, participation and change. Whereas traditional conceptualizations of problematic practices too narrowly filter our capacity to imagine solutions and visions,¹²⁵ human rights norms provide an expansive vision that may remain far from reach and subject to constant refinement. They spur forward step by step reconceptions that have the potential to deal with the root causes.

Human rights norms can promote a questioning of existing cultural norms, institutions and practices. They can also inform the reconceptualization of these cultural norms, social practices and institutions in a manner that is consistent with human rights to dignity and equality. Appreciating the larger context of structural inequalities focuses us on the need to deal with these issues as structural violations of rights and not merely isolated incidents of abuse or discrimination.

This broader vision of the dynamics of human rights as a social practice has important ramifications for the locus of responsibility for ensuring progress on rights. Rather than a narrow focus on justiciability and the role of the courts, this view sees the implementation of human rights as a shared responsibility.

In the first instance, it is important to consider the roles of all branches of government. Craig Scott has proposed that "rights are best understood as a shared project amongst all branches of the state such that robust judicial protection cannot be fully achieved without a conducive legislative and

¹²⁴This point refers to the Supreme Court of Canada's decisions in *Bliss v. Canada (A.G.)*, [1979] 1 S.C.R. 183 and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219. These are discussed in Chapter 6, section 6.2.C.(i) Contextual inquiry and women's equality rights.

¹²⁵Levesque, at 247-8.

regulatory environment."¹²⁶ He notes that neither courts nor legislatures as currently constituted have any necessary claim to be the best suited institutions to monopolize the interpretation and operationalization of human rights. He goes on to suggest that:

we need a constitutional ethos to permeate all government decision-making, an ethic of judicial transformation, and transformation of political ethics that eventually lead to a healthy interaction between the courts and other institutions which take international human rights law seriously.¹²⁷

I would go further and argue that we need to translate this "constitutional ethos" into a "public ethos" that permeates all institutions and relationships. Each of us has an individual and a collective responsibility that rests on the simple proposition that these rights are fundamental and require adherence to equality and justice. Human rights norms require us to work toward constructing a new consensus on the respective roles and responsibilities of the state, families, communities, corporations and so on. However, the fact that rights must be implemented by all within a society does not absolve the state of its primary responsibility. States have a responsibility for perpetuating a larger cultural framework that engenders respect for human rights.

From this perspective, the articulation of the content of human rights is therefore perhaps best seen as a process for the reconciliation of divergent meanings and their application in specific situations. Given this premise, the debate shifts from whether or not there are human rights to questions about what they mean: who decides; how that decision is made; and, who participates in the decision.

Human rights norms provide a starting point for further standard-setting in specific contexts. As a result, discussions over the functional values of these norms must focus, at least in part, on the institutions and processes through which this refinement and concretization takes place. One example of a human rights practice is examined in the following discussion of the ways in which Canadian courts have begun to refine the right to equality.

¹²⁶Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?" (1999) 10(4) *Constitutional Forum* 97, at 108.

¹²⁷*Id.*, at 104.

C. The Right to Equality

(i) The idea of equality

Equality is the paradigm right that informs other human rights norms. These norms are best seen as expressions of the fundamental rights to respect, dignity and autonomy encapsulated in the idea of equality. At the same time, like other rights, the definition of the right to equality is not set. Rather its meaning is the object of consistent struggle through which principles of legal equality are provisionally developed and accepted. This struggle can be conceived as a dialectic through which the specific legal conceptions of equality are opposed by factual inequality. The reconciliation of this dialectic transforms both the legal understanding and the factual experience of equality, thereby advancing social justice.

An abstract normative concept of equality can be derived through a moral or philosophical discourse. However, achieving a practical formulation is more difficult. Equality is a very broad normative idea but a "mysterious political ideal."¹²⁸ It is often defined in reference to a good, whether tangible or intangible, such as equality of opportunity, equality of welfare, equality of resources, equality of concern, equality of capacity and so on.

The concept of equality depends on the actual existence of inequality and various forms of oppression. Thus, a definition of equality often hinges on its absence. Inequality results in discrimination, disempowerments and disadvantage which are systemic but at the same time have very personal consequences. This contributes to conceptual confusion and the apparently illogical and contradictory nature of many current struggles for equality.

¹²⁸Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Harvard University Press, 2000).

The power of equality is more palpable when conceived in a specific context rather than in general philosophical terms. For example, one could focus on what is required for women's equality in the Canada of the twenty-first century. Seen in this light, equality could be defined as being composed of a number of elements including:

- the recognition that it is necessary to incorporate women's specificity, priorities and values into all major institutions;
- concerned with arriving at equal conditions for those most disadvantaged rather than being preoccupied with giving identical treatment;
- freedom from discrimination, and the adjustment of social and cultural patterns and attitudes that perpetuate discrimination;
- women receiving their fair share of the benefits society derives from their participation in all its endeavours;
- the recognition that individual policies and programs can affect women quite differently than men, given differences in life expectancy, socio-economic status, health concerns, and employment patterns;
- a kind of "equal but different" approach;
- a question of valuing both sameness and differences between men and women;
- the recognition of the important differences among women in terms of experience and intersecting forms of discrimination.¹²⁹

In law, equality is given a practical, but inevitably partial definition. The approach taken by Canadian courts to date is presented below, followed by a critique and attempt at reconstruction for the purposes of this study.

¹²⁹This list is based on one a definition of equality set out in Status of Women Canada, *Framework for Equality* (unpublished document, September, 1993), at 8. The purpose of the Framework for Equality is "to provide a means for implementing the government's commitment to gender equality based on a clear government statement as to the meaning of equality and a comprehensive methodology of gender equality analysis (at 3).

(ii) The right to equality in Canadian law

The open list of the requirements for women's equality set out above contains freedom from discrimination as only one aspect of the experience of equality. However, in law, the conception of the right to equality is predicated on discrimination. This focus is found in Canadian legal developments, in most international human rights instruments, and in the jurisprudential approaches of most other Western nations. Canadian courts have created a uniquely Canadian framework for implementing equality guarantees. This framework is continually in the process of evolution. This section outlines some of the main equality terminology, principles and concepts developed to date.

S.15 of the Charter,¹³⁰ human rights codes and the international equality guarantees all share a similar approach founded on the grounds of discrimination. All guarantee equality as defined as freedom from discrimination on the basis of certain group identities or characteristics. Examples of the grounds of discrimination include: sex, race, colour, national origin, religion, sexual orientation, mental or physical disability and so on. Because of the way these provisions are worded, analysis of an equality claim starts with a discussion of what "ground" or basis an individual or group of individuals experienced discrimination. Enumerated grounds are those bases or group identities that are specifically set out in a given equality rights provision. There are differences between the various Canadian and international human rights documents as to which grounds are part of the list and which words are used to describe specific group identities. Some human rights documents leave this list open-ended.¹³¹

¹³⁰Section 15 provides:

- 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- 15(2) Subsection (1) does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

¹³¹For example s.15 of the Charter, set out in footnote 120, leaves open the list protected grounds. This provision also protects against discrimination on other 'analogous' grounds. For example, the Supreme Court of Canada

For many years, the central debate in equality theory was whether the purpose of equality guarantees and anti-discrimination provisions was to achieve formal or substantive equality. In law, this formal/substantive dichotomy is now outdated. Canadian courts have clearly adopted a purposive approach to equality guarantees.¹³² This approach focuses on the context of disadvantage experienced by an individual based on membership in a protected group and the imperative of redressing this disadvantage in a substantive way. Despite these clear developments in the law, the notion of formal equality or equal treatment continues to pervade the approach to equality in many legal fora and in public policy debates. It is therefore essential to examine the difference between the formal and substantive equality models.

Formal equality prescribes the equal (or same) treatment of all individuals regardless of existing circumstances. This approach fails to address the reality of existing inequality and results in the perpetuation of these inequalities. It also fails to acknowledge the built-in biases of apparently neutral, universal norms or standards which have in fact been shaped by the needs and experiences of socially privileged groups. This notion of formal equality, treating all persons the same regardless of their circumstances, must be contrasted with the concept of substantive equality.

Substantive equality demands the redress of existing inequality and the institution of genuine, real, effective equality in the social, political and economic conditions of different groups in society. Substantive equality requires a focus on systemic and group-based inequalities. It encompasses the right to have one's differences acknowledged and accommodated both by the law and by relevant social and institutional policies and practices. In recent years, Canadian courts have become more explicit in their view that the right to equality inherently involves challenging existing norms,

has decided that sexual orientation is a ground that is analogous to the ones enumerated in s.15. *Egan v. Canada*, [1995] 2 S.C.R. 513.

¹³²This approach was taken in the first s.15 case to reach the Supreme Court of Canada, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 and has been reaffirmed in all of the Court's s.15 decisions since. See discussion of the purposive approach with respect to the decision in the *Law* case in Chapter 6, section 6.2.C.

deconstructing them to show their actual discriminatory impact.¹³³ The emphasis on substantive equality principles has been uneven in practice.¹³⁴ It could be argued that one of the conceptual barriers to full substantive equality analysis is the continued focus on "discrimination."

Discrimination is the detrimental treatment of an individual or group of individuals because of their membership in a defined, protected group. Canadian law has become quite sophisticated in analyzing the ways in which discrimination works. This can be seen in a number of conceptual refinements of the central idea. Discrimination has been understood as operating by direct and indirect means, through adverse impact, systemically and in an interactive or multiplying fashion.

Canadian law recognizes that discrimination can take two main forms: direct and indirect. Direct discrimination occurs when an individual is accorded harmful treatment because of her or his group affiliation. Discriminatory acts can be deliberate and conscious or unintentional and unconscious. Omissions can also constitute direct discrimination. The perpetrator may even believe that he or she is acting in the best interests of the individual. For example, it is direct discrimination when a woman is denied a job in a traditionally male sector of the labour force simply because she is a woman.

Again in the context of gender discrimination, indirect discrimination is the application of rules and procedures, which, while they are applied to everyone, have a disproportionate and negative impact on an individual or group of individuals because of their sex, because fewer women can comply with the rule or requirement. Minimum height standards for certain jobs is an example of indirect discrimination based on sex. This is also called adverse effects discrimination. Adverse effects discrimination occurs when the application of an apparently neutral law or policy has a

¹³³See for example, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

¹³⁴For an excellent discussion of this point see Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998).

disproportionate and harmful impact on individuals within a particular protected group.¹³⁵ The policy or law need not have been intended to discriminate against individuals based on their group affiliation. It is the effect of the law or policy not the intent, that determines whether or not adverse effects discrimination has occurred.

Systemic discrimination has been defined as institutionalized policies or practices that disadvantage individuals because they are members of certain groups. This concept raises the pervasive problems of discrimination embedded within institutional practices and policies. Systemic discrimination can encompass both direct and adverse effects discrimination.¹³⁶ Direct discrimination can contribute to systemic discrimination if it represents a widespread practice within an institution, such as sometimes occurs with sexual harassment. To the extent that manifestations of direct discrimination are so much a part of the workplace culture as to be accepted as practice, they constitute systemic discrimination.

Interactive or multiple discrimination consists of the cumulative and compounding effects of discrimination based on several group characteristics. It is impossible to untangle discrimination based on gender and on one or more other grounds such as race and/or disability.¹³⁷

iii) The critique of equality rights analysis

The right to equality developed in Canadian law is sophisticated and multi-faceted. Nevertheless, this jurisprudence is problematic in several respects. The ultimate issue is whether the problems experienced to date are inherent in the idea of equality itself or are simply limitations in the way it

¹³⁵*Ontario(Human Rights Commission) and O'Malley v. Simpsons Sears*, [1985] 2 S.C.R. 536.

¹³⁶*Action Travail des Femmes v. Canadian National Railway Co. v. Canada(Human Rights Commission)*, [1987] 1 S.C.R. 1114. The Court relied on Justice Rosalie Abella's study on systemic discrimination in *Report of the Commission on Equality in Employment* (1984).

¹³⁷See Carol Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (paper presented at *Transforming Women's Futures* conference, 1999). She defines and discusses various three forms of multiple discrimination: intersectional, compound, and overlapping.

has come to be understood. Some commentators locate the problem within the structure of rights themselves. They point to the universalism of the way the right to equality and ways other rights are set out in a manner that ignores the reality of oppression and domination.¹³⁸ In addition, the abstract character of rights means that the right to equality is not always elastic enough to capture the factual experience of inequality.

The conundrum of equality has been conceptualized by feminist scholars as the sameness-difference debate. On the one hand, there is a desire to be treated the same as "benchmark men" in similar circumstances while on the other hand, there is a recognition that the failure to take social, economic, cultural and biological difference into account can result in inequality. This gives rise to an apparent paradox: "to universalize is to deny the distinctiveness of the other; to emphasize the other is to dichotomize, essentialize and hierarchize."¹³⁹ The sameness-difference approach leads to ambiguities and apparent contradictions in considerations of equality. These dissonances are problematic at a theoretical level and are detrimental to the effectiveness of equality strategies and practices.

In the context of Canadian law, the problems and concerns with the right to equality developed thus far have been summarized under eight main points relating to gender discrimination¹⁴⁰:

- **Equality by definition is about comparison:** an equality analysis requires that one articulate whom one is saying one is equal to. The need for a comparator group, can end up perpetuating men and maleness as the norm.
- **Equality essentializes categories:** women all share an essential female identity that is the basis of our subordination and is shared by all women. This approach can result in

¹³⁸These are the same criticisms of rights generally. See authors cited at footnote 74.

¹³⁹Thornton, "Citizenship, Race and Adjudication", at 348-9.

¹⁴⁰A similar type of analysis could be undertaken with respect to forms of discrimination on other grounds such as disability and the intersections between forms of discrimination, such as gender and disability.

advantaging those women who are relatively dominant or advantaged within Canadian society. It obliterates some of the important differences between women.

- **Equality is about asserting a negative, not a positive right:** for many people, equality is limited to the freedom from discrimination.
- **"Gender" is both over and under inclusive:** inequalities do not always operate in ways that apply to all women or do not apply exclusively to women.
- **Equality is gender neutral:** there is nothing within the idea of equality itself that precludes men from asserting claims of gender inequality.
- **Formal equality continues to inform equality analysis:** despite the fact that the Supreme Court of Canada has repeatedly rejected formal equality analysis and promoted a substantive equality analysis, the idea of equality as treating similar people the same way is so integrally tied to these ideas that it sometimes appears unavoidable.
- **Limited Remedial Approach:** an equality analysis is either simplistic or unhelpful in pointing to a remedy, it does not provide any guidance as to what would ameliorate the conditions of inequality being challenged.
- **Equality is an abstraction:** equality is pursued at the expense of concrete specific rights that would be of greater benefit to more women.¹⁴¹

A number of these points are explored in greater detail in this section. First, one of the central concerns is that, despite clear pronouncements of the Supreme Court of Canada, the basic meaning of equality continues to be contested. This can be seen in ongoing tensions in the meaning ascribed to equality. These include anti-equality positions masquerading as equality claims¹⁴² and a limited

¹⁴¹Diana Majury and Carissima Mathen, "What have you done for me lately? Examining the Limitations of Equality Law" (paper presented at the national forum on *Transforming Women's Future*, 1999).

¹⁴²For example, a policy or judicial decision that remedies a barrier to equality experienced by one group can give rise to a claim of "reverse discrimination" on the part of a group that has traditionally been privileged in that regard. In the British Columbia Court of Appeal decision in *BC v. BCGSEU* (1997), 37 B.C.L.R. (3d) 317, the Court held that changing a job test to accommodate women would create "reverse discrimination" i.e. to set a lower standard for women than for men would discriminate against those men who failed to meet the men's standard but were nevertheless capable of meeting the women's standard. The Supreme Court of Canada expressly rejected this position:

The Court of Appeal suggested that accommodating women by permitting them to meet a lower aerobic standard than men would constitute "reverse discrimination". I respectfully disagree. As this Court has repeatedly held, the essence of equality is to be treated according to one's own merit, capabilities and

view of equality framed on a conception of sameness and difference.¹⁴³

While Canadian courts seem to have moved beyond formal equality, at least in the majority of cases, popular understanding of equality seems still very much to be framed in formal equality terms. It appears that there is no escape from the ghost of formal equality:

Formal equality is the model that has been instilled in the minds of most Canadians as the definitive measure of equality. Most Canadians believe that treating people the same is what equality is all about. For them, equality means ignoring differences attributed to race, gender, class, disability and/or sexual orientation. Taking these factors into consideration is generally seen as discriminatory, unfair, anti-equality. The requirements of a substantive approach to equality- that is taking into account gender, race, disability, class, sexual identity-- are counter to the neutrality that the general public has come to accept as a defining feature of equality.¹⁴⁴

The predominance of this outmoded view of equality continues to shape the discourse on equality in the public domain and is an ongoing challenge for equality-seekers. The substantive approach is more abstract, more complex to understand and to apply than the formal equality approach. The continued attraction of the formal equality model leads to the question of whether some other concept might more easily and effectively convey the analysis that is currently being promoted through substantive equality arguments.

circumstances. True equality requires that differences be accommodated. A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men. "Reverse" discrimination would only result if, for example, an aerobic standard representing a minimum threshold for all forest firefighters was held to be inapplicable to men simply because they were men at para.81 (cites omitted).

¹⁴³Day and Brodsky, at 98: "Equality jurisprudence has recognized that equality may sometimes require different treatment, but this insight is too superficial. It does not necessarily translate into an awareness that same treatment is a mischaracterization of the normative goal of equality. It does not represent a clear understanding that inequality is not a question of different treatment but rather of subordination, marginalization, exclusion, and group disadvantage. As long as equality rights law continues to revolve around a conception of equality as sameness and difference, more problems can be anticipated".

¹⁴⁴Majury and Mathen, at 7.

Another concern is that equality analysis as currently conceived requires us to compare "women" and "men", which are both in turn conceived in essentialist terms. This is clearly problematic under a formal equality analysis since there are a wide range of areas of law in which women are not similarly situated to men. These include: family law, maintenance, child support, child custody, divorce, pregnancy and maternity benefits, reproductive rights, social welfare policy, child care, sexual and domestic violence, tax law, and employment policy. However, even with a clear substantive equality approach based on recognizing and valuing differences, the requirement to compare on the basis of men/women remains problematic. It is one of the reasons why the courts have not been able to consistently and adequately address adverse effects discrimination claims on the basis of sex. Three problems arise because the dichotomy between men and women is interpreted in a substantive, material manner that is assumed to apply for all purposes.¹⁴⁵

First, it tends to obscure the differences among women making it more difficult to recognize and remedy inequalities that have a disproportionate effect on a group of women based on a number of intersecting characteristics such as sex, race and social class. One clear example of this is the *Sparks* case where the Nova Scotia Court of Appeal created an analogous group of "public housing tenants", at least in part to avoid the difficulties of working with the men/women dichotomy on the facts of this case.¹⁴⁶

Secondly, the dichotomy tends to be interpreted in a way that privileges rather than challenges the male as the norm. This analysis proceeds on the basis of how women are different from men rather than how a law, policy or practice would be developed in the absence of structural inequalities.

¹⁴⁵This can be compared to a more relational approach discussed below.

¹⁴⁶*Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 119 N.S.R. (2d) 91. The Nova Scotia Court of Appeal struck down provisions of the *Residential Tenancies Act* which excluded public housing tenants from the security of tenure afforded to other renters in the province. The appellant, Ms. Sparks was a Black, single mother on social assistance. Reversing the lower court's decision, the Court of Appeal found that the effect of denying security of tenure to public housing tenants is to discriminate against public housing tenants as a group, on the basis of race, sex and income. In reaching its decision, the Court found that low income is a characteristic shared by all residents of public housing, and that poverty is a condition experienced more frequently by Blacks, women, in particular single mothers, as well as by senior citizens. See discussion at 233-34.

There are a number of cases in which the courts have directly challenged the male norm, for example, that workers do not become pregnant¹⁴⁷ or that job-related physical fitness tests cannot be based solely on male physical capacity and ways of working.¹⁴⁸ However, these are the exceptions rather than the rule of how adverse effects analysis has been undertaken by Canadian courts.¹⁴⁹

Thirdly, comparative analysis hinders the potential of advancing an equality claim where the discriminatory impact does not coincide perfectly with the categories of "women" and "men".¹⁵⁰ The inability or unwillingness of majority of Supreme Court justices to address the issue the taxation of child maintenance payments as a sex discrimination issue in the *Thibaudeau* case can be attributed, at least in part, to this analytic approach.¹⁵¹

The limitations of equality rights as a concept relate back to the limitations of rights in general. As noted above, the formulation of the experience of inequality in terms of rights is problematic. At present, rights discourse tends to focus exclusively on the actions of two actors in relation to one another (whether individual/state, individual/private organization, or individual/individual) and leaves out the complicated and ongoing processes through which relations among multiple actors and actions combine to construct people's actual life conditions and shape their choices, capacities, identities and desires. As a consequence, equality rights claims are unable to get at the causes of inequality. They deal only with discrete symptoms, leaving underlying social structures

¹⁴⁷*Brooks, v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

¹⁴⁸*BC v. BCGSEU*.

¹⁴⁹These difficulties are particularly evident in complex adverse effects discrimination cases where there is women are disproportionately and negatively affected. This problem is exemplified by a comparison of the majority and dissenting reasons of the Supreme Court of Canada in *Symes v. Canada*, [1993] 4 S.C.R. 695 and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. See discussion in Chapter 6, Section 6.2.C.

¹⁵⁰Dianne Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 *National Journal of Constitutional Law* 295.

¹⁵¹Pothier, at 326-9.

untouched.¹⁵² Equality rights only address discrete injustices; yet social inequality is more than an accumulation of discrete injustices.¹⁵³ Significant social change requires work at the structural and institutional level, dimensions which are perceived to be external to law.

(iv) **Reconceptualizing the right to equality**

Given these strong concerns, many equality rights activists and theorists have begun asking some hard questions about the concept of equality.¹⁵⁴ These center on whether the focus on equality rights should be retained or abandoned and whether or not the problems arise from the concept itself or from current approaches to equality analysis. Close on the heels of these questions come discussions on what alternative conceptions would have a greater capacity to advance social justice. The question is whether or not it is possible to fashion conceptions that are "more radical, more directive, more demanding."¹⁵⁵ While part of this inquiry is strategic, concerns about the social practice of equality rights fundamentally stem from conceptual problems with the way equality is characterized.

In my view, the critique of existing equality analysis does not require the abandonment of the concept of equality rights. Rather, it argues for a broader, reconceived approach to equality rights along similar lines to the reconsideration of human rights in the previous section. The reconceptualization of equality is explored under four main themes: solidifying the link between equality and justice; enlarging substantive equality analysis; emphasizing the relational nature of equality; and seeing equality as a fundamental principle as well as a human right.

¹⁵²Bakan, at 51.

¹⁵³*Id.*, at 53.

¹⁵⁴See for example, Majury and Mathen; Jhappan; Carol Aylward, Sheila McIntyre and Elizabeth Shilton, "Using the Master's Tools: Whether and When Equality Activists Should Choose Rights Litigation to Advance Egalitarian Change" (paper presented at national forum on *Transforming Women's Future*, 1999).

¹⁵⁵Majury and Mathen, at 1.

a. **Equality and Justice**

The continuing problematic experience with the equality rights within Canadian law has led some commentators to suggest that the focus should shift to other conceptual frameworks. As discussed above, citizenship and personhood integrate equality norms in a fundamental way and provide enlarged frameworks for addressing structural inequalities. Another approach is to focus directly on the ultimate claim of social justice thereby bypassing limitations in current equality concepts.

This argument has been made by Rhada Jhappan in her review of the experience with litigating women's equality rights in Canada.¹⁵⁶ She concludes that "women who aim for equality with men lack ambition, we should aim higher, for justice."¹⁵⁷ In strategic terms, this suggests that litigation efforts should be refocused from equality to justice:

Justice, in my view, is a concept both citizens and courts would be better able to cope with since it allows difference, releases us from essentialist and assimilationist imperatives, lends itself much more to situational rather than abstract analysis, and speaks to a sense of fairness, of treating people well, as worthy and as deserving of respect.¹⁵⁸

This proposal relocates the focus from constructing arguments based on the equality provisions in s.15 of the Charter and towards Charter provisions dealing with justice.¹⁵⁹ It is a way to anchor

¹⁵⁶Jhappan. "The Equality Pit or the Rehabilitation of Justice". In her discussion, Jhappan focuses in particular on the approach taken by the work of Women's Legal and Educational Action Fund (LEAF) in its interventions in a large number of equality rights cases.

¹⁵⁷*Id.*, at 105.

¹⁵⁸Radha Jhappan, "Litigating Social Justice: A Modest Proposal for a Strategic Change" (paper presented at national forum *Transforming Women's Future*, 1999) at 4. This is a condensed version of her longer 1998 article in 10 *Canadian Journal of Women and the Law* cited above.

¹⁵⁹These are: s.1 (which states that Charter rights and freedoms can only be subject to reasonable limits demonstrably justified in a free and democratic society; s.7 (which guarantees the right to not be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice); and s.24 (to obtain such a remedy as the court considers appropriate and just in the circumstances).

equality analysis in a broader justice frame. To date, legal arguments that import equality analysis into an interpretation of "the principles of fundamental justice" in several Charter cases.¹⁶⁰

Jhappan points out that one of the advantages of the broader, justice approach is that it shifts the focus from the identity of the claimant to the relationship in which she is oppressed. Justice is more flexible, therefore, in forwarding intersecting claims as it is unencumbered by narrow comparisons of ascribed identities such as "sex". As an example, rather than framing an equality issue as the effect of a provision on one group by comparison with another we could ask questions like: "what principles of fundamental justice are served by the exclusion of foreign domestic workers from the benefits of those minimal standards in labour laws, in a way that sanctions their exploitation?"¹⁶¹ or "By what principles of fundamental justice is Parliament authorized to abrogate Aboriginal women's Aboriginal rights and exile them from their communities?"¹⁶² This is a very different from the current framing of equality claims, where the focus is on trying to decide which other group is the 'correct' reference group to which claimants must compare themselves and argue that they are similarly situated, or not.

However, Jhappan does not suggest that feminist constructions of justice will be uncontested. The current limitations of the judicial system would continue to operate since the courts are likely to experience the same difficulty in dealing with injustices as they do inequalities. Nevertheless the substantive social justice approach does signal a change in focus at the conceptual level. It contains the promise of avoiding narrow, abstract legal categories, and more accurately conveying the complex issues contextualized by women's reality.

¹⁶⁰See for example LEAF interventions which have incorporated equality arguments into s.7 analysis in the context of access to civil legal aid (*New Brunswick (Minister of Health and Community Services) v. G.(J.)* 177 DLR (4th) 124) and in the context of dealing with delay in sexual harassment proceedings under human rights codes (*Blencoe v. BC (Human Rights Commission)*, [2000] 2 SCR 307).

¹⁶¹Jhappan, "Litigating Social Justice" at 8.

¹⁶²Jhappan, "The Equality Pit or the Rehabilitation of Justice", at 95.

This proposed approach is fundamentally sound in that it links equality analysis with the ultimate objective of achieving social justice. It makes certain important advancements over current equality analysis including avoiding the need to found claims for equality on the basis of problematic categorizations and comparisons and providing more direction for the development of remedies. However, it is best seen as a strategy for more fully contextualizing equality claims, rather than as an alternative to equality conceptions.¹⁶³

b. Enlarging Conceptions of Substantive Equality

Equality rights analysis can also be reconceived by pushing the boundaries of the concept of substantive equality. This involves the ways in which we move from the abstract conception of equality to its contextualized interpretation and application. Theory and experience have shown us that substantive equality is in large measure about disassembling the norms that operate to shape Canadian society and privilege some individuals and groups and disadvantage others. This perspective is based on a more nuanced and multi-layered understanding of equality:

Current inequality is a consequence of the interplay of historical practice, existing norms and the detritus of apparently outdated norms, deep-seated ideological assumptions and the failure to take adequate measures to overcome recognized disadvantages. The inquiry raised by claims of substantive inequality therefore requires asking what it is about societal structures, existing norms and ideological assumptions which results in inequality and what must be changed in order to achieve equality.¹⁶⁴

¹⁶³It should be noted that this is not Jhappan's view as she argues that is impossible to escape the essentialism and assimilationalism of equality rights analysis even through a substantive contextualized approach. In her view, framing issues in terms of justice is an alternative creative legal strategy that would be part of a "multi-pronged strategy that includes, but is not limited to, the equality frame" (at 106).

¹⁶⁴Patricia Hughes, "Equality as a Fundamental Principle" (paper presented at the national forum *Transforming Women's Future*, 1999) at 8. This paper has been published in a different form as "Recognizing Substantive Equality as a Fundamental Constitutional Principle" (1999) 22 *Dalhousie L.J.* 5.

Equality analysis is about revealing inequality which is experienced and palpable from one perspective but hidden from others.¹⁶⁵ Human rights practices need to go further in terms of employing women's stories and detailed factual analysis to ensure that this experience is translated into terms that can be heard and appreciated by others. This analysis must convey the layers and complexities of women's inequality in a form that is understandable to the judiciary and policy makers. In doing so, they must directly address the limitations of the pervasive formal equality framework.

One way to enlarge substantive equality analysis is to place greater emphasis on structural inequality. Structural inequality consists in "the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social position, as compared with others who in their social positions have more options or easier access to benefits."¹⁶⁶ While structural inequality is not always determinative of outcomes, even those who successfully overcome obstacles cannot be judged as equal to those who have faced fewer structural obstacles.¹⁶⁷ A vivid image of structural inequality has been created:

Marilyn Frye likens oppression to a birdcage. The cage makes the bird entirely unfree to fly. If one studies the causes of this imprisonment by looking at one wire at a time, however, it appears puzzling. How does a wire only a couple of centimetres wide prevent a bird's flight? One wire at a time, we can neither describe nor explain the inhibition of the bird's flight. Only a large number of wires arranged in a specific way and connected to one another to enclose the bird and reinforce one another's rigidity can explain why the bird is unable to fly freely.¹⁶⁸

¹⁶⁵*Id.*, at 11.

¹⁶⁶Young, *Inclusion and Democracy*, at 98.

¹⁶⁷*Id.*, at 99.

¹⁶⁸Marilyn Frye, "Oppression", in *The Politics of Reality* (Trumansburg, NY: Crossing Press, 1983), quoted in Young, *Inclusion and Democracy*, at 92-3.

Focusing on structural inequality highlights the ways in which actions and interactions both occur in the context of the collective past and also often have future effects beyond the immediate purposes and intention of the actors.¹⁶⁹

A specific example of structural inequality can be drawn from the various ways that women's oppression is grounded in a gendered division of labour in the family.¹⁷⁰ One way to explain this structure is to begin with the way in which society continues to be organized around the expectation that children and other dependent people ought to be cared for primarily by family members without formal compensation and the fact that at the same time, good jobs, assume that workers are available at least forty hours per week, year round. Due to a combination of social and economic factors, women are predominantly the primary caretakers of children and other dependent persons and as a consequence the attachment of many women to the world of employment outside the home is more episodic, less prestigious, and less well paid than men's. Together these factors mean that women tend to depend on male earnings for primary support of themselves and their children which contributes to unequal power in the family. These factors also mean that women have less power in a society and economy which values paid work to the exclusion of other types of contributions. This unequal power is exacerbated upon conditions like separation, divorce and widowhood. The assumptions made by schools, employers, and the media tend to reflect the expectation that domestic work is done primarily by women. These assumptions in turn help to reproduce these unequal structures.

This example is only one aspect of the structural inequalities experienced by women.¹⁷¹ Yet it quickly demonstrates the limitations of current equality analysis which is focused on dealing with the impact of a particular law on women or a human rights complaint brought by an individual

¹⁶⁹Young, *Inclusion and Democracy*, at 97.

¹⁷⁰Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).

¹⁷¹To provide a more complete account, Young notes that it would have to integrate other elements such as sexuality (*Inclusion and Democracy* at 94). See also, Day and Brodsky's description of women's inequality as caused by a number of interlocking factors, at 7.

woman against a specific respondent. These approaches are incapable of dealing with causes of inequality that transcend a single entity, for example, the interaction of inequality in the educational system and in employment practices.

Substantive equality analysis could be enlarged by placing greater emphasis on structural groups, as distinct from cultural groups. This distinction is made by Young who has argued that while they are often built upon and intersect with cultural differences, the social relations constituting gender, race, class, sexuality, and ability are best understood as structural. In her view, the social movements motivated by such group-based cultural experiences are largely attempts to politicize and protest structural inequalities that are perceived to unfairly privilege some social segments and oppress others.¹⁷²

The link with structural inequality is key. It is essential to replace the current focus on discrimination with a much greater emphasis on structural inequalities, defined in terms of inequalities of wealth, social and economic power, access to knowledge, status, and work expectations.¹⁷³ Fundamentally, equality analysis should encompass a shift from differentiations of gender, race, ability, class concerns to structural relations of power, resource allocation and control over discourses within society.

c. Equality as a Relational Concept

Placing renewed emphasis on structural inequalities in the social practice of equality rights is tied to the recognition that the right to equality is a fundamentally relational concept. The vision is not "I want to be equal to you within the current state of affairs" but rather a vision of relationships of equality within transformed social relations.

¹⁷²Young, *Inclusion and Democracy*, at 87-92.

¹⁷³This is Young's definition, *id.*, at 34.

Nitya Iyer has made a strong case for a relational approach in her work on the ways in which interactive or multiple discrimination is suppressed by the current legal analysis and legal framework of discrimination.¹⁷⁴ She has proposed that we can try to overcome this problem by shifting the focus from the individual complainant to his or her relationship with others. The focus should be on the whole picture surrounding the discriminatory conduct rather than on the individual him or herself. Iyer suggests that while the use of categories of discrimination should be continued, discriminatory behaviour ought to be assessed in light of three interrelated considerations:

- (1) the characteristics of all people involved in a given situation (race, gender, etc...);
- (2) their relationship and the conduct arising out of it; and
- (3) the larger social context within which that relationship is located.¹⁷⁵

She also suggests that the categories of discrimination should be "flexible, dynamic and relational."¹⁷⁶ That they should, in effect, provide an opportunity or "jumping-off point" for human rights investigators and adjudicators to consider and construct an intricate picture of the stereotypes and relationships involved. Such an analysis would address the problem of artificially isolating one category from another, as well as assuming homogeneity within each category.

This approach is taken further in Young's work. She argues that groups do not have identities as such, but rather individuals construct their own identities on the basis of social group positioning. It is this faulty emphasis on group identity that results in the problematic categorizations in equality analysis, including the tendency to deny differentiation within and across groups. Everyone relates to a plurality of social groups and every social group has other social groups cutting across it.¹⁷⁷

When defined relationally, a social group is a collective of persons differentiated from others by

¹⁷⁴N.Iyer, "Categorical Denials: Equality Rights and The Shaping of Social Identity" (1993) *Queen's L.J.* 179.

¹⁷⁵*Ibid.*

¹⁷⁶See discussion of this point in Aylward, *Canadian Critical Race Theory*, at 78.

¹⁷⁷Young, *Inclusion and Democracy*, at 88.

cultural forms, practices, special needs or capacities, and/or structures of power or privilege:

By conceiving of social group differentiation in relational rather than substantial terms, we can retain a description of social group differentiation, but without fixing or reifying groups. Any group consists in a collective of individuals who stand in determinate relations with one another because of the actions and interactions of both those associated with the group and those outside of at the margins of the group.¹⁷⁸

Following Young's approach, the attributes by which some individuals are classed together in the 'same' group appear similar enough only by the emergent comparison with others who appear more 'different' in that respect. Relational encounters produce perceptions of both similarity and difference. In this relational conceptualization, what makes a group a group is less some set of attributes its members have than the relations in which they stand to others. Conceiving group differentiation as a function of relation, comparison and interaction allows for overlap and interdependence among groups and their members.¹⁷⁹ Rigid conceptualizations of group differentiation both denies the similarities that many group members have with those not considered in the group, and denies the many shadings and differentiations within the group.¹⁸⁰

The integration of a relational conception of equality into the human rights practices is a fundamental move away from the sameness-difference dichotomy that has hindered progress to date.

¹⁷⁸*Id.*, at 89.

¹⁷⁹Martha Minow, *Making All the Difference* (Ithaca, NY: Cornell University Press, 1990), Part II. See also William Connolly, *Identity/Difference* (Ithaca, NY: Cornell University Press, 1993); and Chantal Mouffe, "Democracy, Power and the 'Political' ", in Seyla Benhabib (ed.) *Democracy and Difference* (Princeton: Princeton University Press, 1996).

¹⁸⁰Young goes on to argue that: "None of this determines individual identities. Subjects are not only conditioned by their positions in structured social relation; subjects are also agents. To be an agent means that you can take the constraints and possibilities that condition your life and make something of them in your own way." (*Inclusion and Democracy* at 101.

d. Equality as a Fundamental Principle

Another step toward expanding the legal concept of equality is to see equality as both a right and a principle. Part of the problem is that we do not think enough of the larger sense of equality: there is difference between equality and equality law. Equality connotes an equal right to dignity, autonomy and participation. This means the fundamental conditions by which all individuals can participate must be provided by meeting political, social, economic and cultural needs.

One proposal for broadening the equality lens has been developed by Patricia Hughes.¹⁸¹ She proposes that equality should be seen as a fundamental principle or general lens. Equality is a fundamental norm underlying all of international human rights law and is a fundamental organizing principle within the Canadian constitution. This status should be clearly reflected in human rights practices.

The Supreme Court of Canada has identified an ever-growing list of constitutional principles as foundational or organizing principles. These are the political, social and legal values or principles upon which the ordering of Canadian society rest.¹⁸² They establish the parameters of our constitutional framework, influence the interpretation of express provisions and fill in the gaps of written constitutional tests. These are not merely abstract or philosophical guidelines but may give rise to "substantive legal obligations" of either a general or precise nature.¹⁸³

To date the Supreme Court of Canada has recognized the following as fundamental principles: federalism, democracy, the rule of law, protection of minorities, freedom of speech and judicial

¹⁸¹Hughes, "Equality as a Fundamental Principle".

¹⁸²The Supreme Court of Canada has developed the concept of fundamental constitutional principles most fully (although not only) in three cases: *Quebec Secession Reference*, [1998] 2 S.C.R. 217; *Provincial Judges Reference*, [1997] 3 S.C.R.; and *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721.

¹⁸³Hughes, at 4.

independence.¹⁸⁴ Substantive equality should be recognized as a foundational constitutional principle, it should have at least the same status as free speech.¹⁸⁵ According to Hughes, the foundational principles inquiry is a dialogue about the nature of society through a legal lens: Substantive equality principles should be recognized as part of the "internal architecture" of Canada's constitution thereby providing a broad constitutional equality lens through all other constitutional issues would be filtered."¹⁸⁶

This recognition would not replace the right to equality or equality rights litigation. Rather, it would add to it. It would serve a different constitutional purpose and attract a different type of analysis. Importantly, it would not be subject to s.15 wording which is tied to an anti-discrimination approach nor by the requirements of the formula of s.15 analysis¹⁸⁷ and the reasonable limits defence.

The right to equality can be reconceived by emphasizing its fundamentally relational nature and the integral link to the factual experience of structural inequality. Strategies for advancing this reconceptualization include: enlarging substantive equality analysis; creating stronger links between conceptions of equality and justice; shifting the focus from the individual to his or her situation; and promoting equality as a fundamental constitutional principle.

This reconceptualization of equality demonstrates that the constraints in its current usage within the legal system are not inherent in the concept itself. Rather, these constraints are attributable to the narrowness of our understanding and application of equality.

¹⁸⁴Robin Elliot discusses each of these principles and identifies a number of additional principles in his review of Supreme Court of Canada jurisprudence in "References, Structural Argumentation and the Organizing Principles" (2001) 80 *Canadian Bar Review* 67 at 98-138. He adds: the role of provincial superior courts; interprovincial comity; the separation of powers; economic union; the integrity of the nation state; and, the integrity of the constitution. Elliot refers to the principle of freedom of speech more globally as individual rights and freedoms.

¹⁸⁵Hughes, at 4.

¹⁸⁶*Id.*, at 12.

¹⁸⁷The form of s.15 analysis is set out in detail in the discussion of the *Law v. Canada* in Chapter 6, section 6.2.C.

1.5 The Transformative Power of What Could Be

Together the concepts examined in Chapter 1 establish the analytical framework within which the thesis questions are framed and explored. This concluding section draws together these concepts and sketches out the relationships between them. This framework is the foundation for the transformative ideal developed and applied in this study.

Law consists of both facts, that is its factual generation, administration and enforcement and the norms upon which its claim to validity is based on account of which it deserves general recognition. The tension between the two is a creative force which leads to social learning. Just as law has a dual character, so too human rights have a dual nature as a body of doctrine and a social practice. The pursuit of human rights is best seen as a group of social practices that contribute to this social learning process.

Human rights are social practices of which legal interpretation of rights is only one of many facets. The human rights movement has been described as "the quintessential "self-help" movement. It identifies its subjects broadly, leaving it to the subjects themselves to step forward, to identify themselves and claim human rights law as their own."¹⁸⁸ This approach underscores the need for a broad understanding of the spaces and ways in which human rights norms are translated into factual experience.

Human rights practices are considered to be "transformative" to the extent that they intentionally contribute to social transformation. The latter is conceived as operating on four dimensions: individual and group perceptions, behaviours and attitudes; ideas and ideology; institutions; and structure. These dimensions are not static, and in particular are influenced by place, previous experience and the prism of history. This approach highlights the view that human rights must operate through a culture, not simply through formal institutions. The concept of social

¹⁸⁸Barbara Stark, "International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Wheel" in R.L.Teske and M.A. Tetreault, *Conscious Acts and the Politics of Social Change* (Columbia: University of South Carolina Press, 2000), at 125.

transformation provides a further analytical function of assisting our understanding of both the degree of change required and the nature of social change.

One important motor for social transformation is the positing of alternatives which encourage us to escape from seeing the existing status quo as the one possible reality. Human rights norms, and particularly the right to equality, provide an opening and initiate the search for change leading to social transformation.

Social justice is a comprehensive concept that provides an ultimate vision or end goal of social transformation. It has both a substantive and a procedural component, assisting us to analyze and address persistent social and structural inequalities. Thus, transformative human rights practices are ones that consciously contribute, on both a procedural and a substantive level, to social justice. The focus is shifted away from a results-oriented primary emphasis on dispute resolution to a more fundamental focus on relationships and unequal structures that violate human rights.

Equality is a central human rights norm. Equality operates both as a legal right and as a principle that informs social practices. Equality as a transformative practice requires us to think in terms of creating equality rather than only remedying inequality.¹⁸⁹ Equality is created and re-created on a daily basis, in the same way that inequalities are created and re-created.

Social justice, human rights, and equality all provide alternative organizing principles for society in opposition to power. They provide both an alternative vision and guidance on how this vision is to be achieved. Each in their own way, enriches us with "the transformative power of what could be." Together these concepts provide a normative and change-oriented framework.

This transformative framework is a normative foundation upon which the examination of the function of legal institutions can be carried out. This involves rethinking the way Canadian legal

¹⁸⁹Christiane Northrup, *Women's Bodies, Women's Wisdom. Creating Physical and Emotional Health and Healing*, rev. ed. (New York: Bantam Books, 1998).

institutions operate so that they can facilitate transformative human rights practices. As developed in this chapter, the analytical framework provides some initial guidance as to how to transform the potential of human rights talk into "actuality" through social practices in which rights norms are both defined and actualized.

One of the principle concerns of the transformative ideal is the need to be creative in ascertaining how law can assist in diffusing an ethos of respect for rights in a social justice framework. This entails a very expansive view of law. Law is much more than what courts and lawyers do; law fundamentally involves the manner in which people treat each other.¹⁹⁰ A number of guide posts for the development of transformative human rights practices to facilitate this creative process can be drawn at this initial point.

First, transformative human rights practices should integrate a balanced analysis of structure and agency. Translating rights guarantees into effective rights requires rendering personhood and sense of agency more visible. At the same time, this work must take place in the context of developing a greater understanding of the structural inequalities and the systemic nature of rights violations.

Secondly, transformative human rights practices must be developed that can shape both policy-making and (so-called) private action. A variety of methods is required to ensure that human rights standards contribute to social justice and multiple means must be pursued for incorporating human rights standards into legal, social, economic, administrative and personal actions. All of these fields are, in effect, spaces and processes in which the implementation of rights can take place.

Thirdly, this framework has important implications for the shape of the transformative practices and in particular the legal treatment of rights. Social justice, rights and equality must inform the practice as well as the substance. Since rights stand in opposition to power, the role of power in the resolution of rights disputes is problematic. The transformative approach necessitates questioning

¹⁹⁰Levesque, at 231.

the current legal model based on the view that direct implementation of rights through confrontational adversarial model is best suited to promoting equality and achieving social justice. A related issue is the balance of individual and systemic approaches, and finding alternatives to the primacy of individual complaints. This does not mean abandoning adversarial litigation completely, but it may mean transforming it by developing alternative models of conflict resolution. This involves, for example, looking at the transformative potential of mediation and the possibility of using individual complaints to full advantage in achieving systemic change.

From a transformative perspective, change occurs by facilitating participants in human rights social practices to go through their own learning process, not through the imposition of outcomes. Human rights norms intervene in change processes to redirect the direction of learning. Intervention is required because there is a tendency to only process information that reinforces what we already believe about ourselves and society. This redirection takes place by learning about alternative perspectives on substantive equality norms and the ways in which social and structural inequalities are experienced by ourselves and by others.

The parameters of social justice will be set by the meanings which are given to human rights through practices in social, legal and political institutions and in informal settings. While the courts and human rights commissions may be the central focus of a determination of rights, all institutions and social practices will contribute to the definition and actualization of rights norms. Within the normative framework established in this chapter, the main role of legal institutions is to contribute to the development and application of shared, reflectively-held human rights norms by fostering transformative practices. The ability of legal institutions to function as an important site for exploring the promise of achieving social justice through equality is limited at present. The institutional, cultural and practical limitations on legal institutions are investigated in the next chapter.

CHAPTER 2

THE ROLE OF CANADIAN LEGAL INSTITUTIONS IN ACHIEVING SOCIAL JUSTICE

2.1 INTRODUCTION

The first chapter established a transformative framework based on normative conceptions of social justice, human rights and equality. Within this framework, human rights are seen as a group of social practices through which social transformation can be achieved. It was posited that legal institutions have an important but not exclusive role to play within these social practices. Accepting that human rights norms have a role in ordering society and in shaping it toward social justice is only a departure point. This recognition and acceptance of the general role of human rights must be supplemented by agreement on the processes by which decisions are made concerning the interpretation and application of human rights norms in specific circumstances. This discussion relates to the first thesis question: are legal institutions as they are currently conceived and operated accomplishing their part of the task of achieving social justice?

This chapter outlines the current understanding of the roles of Canadian courts and human rights commissions in interpreting and applying human rights. It also provides an overview of the main critiques of these institutions and the processes undertaken by them. These criticisms center on four interrelated issues: arguments about the legitimacy and appropriate role of legal institutions; problems concerning how these institutions currently function; and controversies over the relative merits of formal adversarial and informal resolution processes. Together these four debates shape

the current problematique of the role and function of the courts and human rights commissions and delimit discussions about potential reforms.

This outline is followed by an analysis and critique of these understandings that shows how the current view of legal institutional roles is unnecessarily circumscribed. The argument presented concludes that the narrowness of the current debates over the nature of these roles and processes further restricts the transformative potential of these institutions to play an important role in achieving social justice. For the most part, it obstructs rather than assists us in this task. The first question must be posed anew before it is possible to move on to consideration of the second question, that is, what types of institutional changes should be considered so that Canadian legal institutions achieve their part of the task of achieving social justice.

The final section provides an alternative approach to conceiving the legal institutional roles and processes for interpreting and applying human rights based on the transformative framework developed in Chapter 1. This reformulation establishes a new problematique focused on the question of what role Canadian legal institutions **could** have in contributing to the protection and promotion of human rights. This new problematique causes us to rethink the way Canadian legal institutions operate and paves the way for discussions as to how they could foster transformative human rights practices.

2.2 Current Conceptions of The Role of Canadian Legal Institutions

Courts are an essential part of the machinery of Canadian government. They play an important role in maintaining order, upholding the rule of law and preserving public confidence in society's institutions. Courts serve a number of important functions within a democratic society. These include: providing authoritative statements about the law, adjudicating specific claims, facilitating

and promoting negotiated settlement and a number of other services (processing uncontested claims, promulgating rules of procedure and so on).¹

The courts's authoritative statements about the law contribute to the background norms necessary for private ordering. These norms are more than rules for dispute resolution, they form part of the basis upon which individuals plan their affairs and conduct their business. Formal adjudication is responsible for the resolution of only a very small number of disputes.² Therefore, the principal contribution of the courts can best be seen as providing the background of norms and procedures against which negotiations and regulations takes place in both private and governmental settings.³

In general, commentaries on the role of courts refer to the resolution of disputes and vindication of rights in global terms. However, this oversimplification is problematic. Dispute resolution is a party-centered, fact specific task. Rights vindication is a larger task that concerns ensuring compliance with legal rules, rather than the adjudication of a particular dispute. In practice, Canadian courts interpret and apply human rights norms as they arise in the course of litigation, whether through a challenge to the constitutionality of legislation or governmental action, judicial review of the decisions of human rights tribunals, through the application of the common law, and in the course of statutory interpretation. With only minor exceptions, the procedures for hearing and deciding human rights cases are the same as for any other type of litigation.⁴

A court's role is primarily shaped by the cases brought before it. For the most part, these are framed

¹Report of the Canadian Bar Association Task Force on Court Reform in Canada, *Court Reform in Canada* (Ottawa: Canadian Bar Association, 1991), at 42-3.

²It is estimated that only 3-5% of civil claims (non-criminal cases) are adjudicated by a court. There is an even greater number of disputes that are never framed as legal disputes and are either left unresolved or settled without any intervention from the judicial system. Marc Gallanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA Law Review* 438.

³Marc Gallanter, "The Radiating Effects of Courts" in K.O. Boyum & L.Mather, eds, *Empirical Theories About Courts* (New York: Longman, 1983) 117, at 121.

⁴The rules of procedure of various Canadian courts, and particularly the Supreme Court of Canada, provide some procedural recognition of the public interest in these cases (these include rules of standing, a role of public interest intervenors). There is also mandatory notice to governments where a constitutional question is raised.

as concrete disputes. Exceptions to this rule include government's power to refer constitutional issues for the court's consideration and a limited capacity for public interest parties to apply for a declaration of unconstitutionality where there is no factual dispute giving rise to the application.⁵

Courts are independent of government and judicial independence has been recognized as a fundamental principle of the constitution and therefore one of the cornerstones of Canadian democracy that cannot be interfered with by government.⁶ The superior courts have an inherent jurisdiction to hear all types of cases and have very broad remedial powers. These courts are not limited by statute and their functions cannot be altered by legislative or executive action. The Charter also provides broad remedial powers to all courts of competent jurisdiction. Furthermore, the courts have an extensive capacity to control their own procedures.

Human rights commissions were established in conjunction with statutory human rights guarantees.⁷ These administrative agencies were developed as a conscious response to the deficiencies of the traditional mechanism for the vindication of rights, the courts.⁸ In particular, commissions were designed to be much more accessible to individuals through the provision of assistance and the implementation of fast, inexpensive and simplified procedures.

⁵For example, in Ontario an application for a declaration of unconstitutionality can be made to the Ontario Superior Court of Justice under Rule 14.05(3) (g.1) of the *Rules of Civil Procedure*. Normally these applications are allowed only where the public interest party demonstrates that it is a constitutional issue that is unlikely to arise to be raised in the normal course of litigation. For an example of an application under this rule see *Canadian Foundation For Children, Youth and the Law v. Canada (Attorney General)*, [2000] O.J. No. 2535 (challenging s.43 of the Criminal Code which provides a defense to the use of reasonable corrective force against a child by a parent or teacher, on the grounds that it infringes children's section 7 and 15 rights under the Charter).

⁶*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

⁷Each province and territory has established a human rights scheme through legislation: (Alberta) *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11; (British Columbia) *Human Rights Code*, R.S.B.C. 1996, c.210; (Manitoba) *Human Rights Code*, S.M. 1987-88, c.45; (New Brunswick) *Human Rights Code*, R.S.N.B. 1973, c. H-11; (Newfoundland) *Human Rights Code*, R.S.N. 1990, c. H-14; (Northwest Territories) *Fair Practices Act*, R.S.N.W.T. 1988, c. F-12; (Nova Scotia) *Human Rights Act*, R.S.N.S. 1989, c.214; (Ontario) *Human Rights Code*, R.S.O. 1990, c. H-19; (Prince Edward Island) *Human Rights Act*, R.S.P.E.I. 1988, c. H-12; (Quebec) *Charter of human rights and freedoms*, R.S.Q., c. C-12; (Saskatchewan) *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; (Yukon) *Human Rights Act*, R.S.Y. 1986 (Supp.), c.11. In addition, federal legislation applies to federal private businesses, the federal government and the governments of the Northwest Territories and Nunavut, *Canadian Human Rights Act*, R.S.C. 1985, c.H-6. These statutes have been subject to various amendments over the years and these are not listed here.

⁸For a discussion of this history, see Howe and Johnson, *Restraining Equality*.

The commissions serve two main functions. First, they are designed to expertly and expeditiously address human rights claims as they arise in the context of certain private relationships, particularly in the employment context, tenancy and the provision of services. This mandate is carried out through investigation, conciliation and mediation, and where required, through adjudication by an expert panel. In many Canadian jurisdictions, the quasi-judicial hearing function is now undertaken by a separate human rights tribunal.

Informal dispute resolution processes have been an important part of the human rights process since comprehensive human rights statutes were first adopted. At their inception, it was stressed that the prime role of commissions should be to attack discriminatory behaviour not to engage in lengthy legal battles.⁹ As a result early conflict resolution was seen as a key priority. Conciliation, persuasion and education were all perceived as vital to the process of applying human rights.¹⁰

In addition to this claims resolution function, human rights commissions are charged with the broader objectives of both protecting and promoting human rights. This broader mandate is carried out through a wide range of methods, including: education, research, monitoring, documentation, promulgation of guidelines and advisory work.

Human rights commissions play a distinct yet complementary role to the courts in the interpretation and application of human rights. While the commissions's field of human rights activity is much narrower by comparison with the judiciary's broad and unfettered scope, the former have the potential to have a much deeper and ongoing impact within their field of activity.

This greater potential is attributable to a number of factors. First, a general requirement of most administrative agencies, including the commissions, is that they take into account the public interest in their decision-making. As a result, human right commissions serve as an important forum for

⁹W.S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" 46 *Canadian Bar Review* (1968) 565.

¹⁰Ibid.

public debate about Canadian rights policy and provide institutional support for rights advocacy. Human rights commissions also possess investigative, supervisory, enforcement and other powers beyond those ordinarily exercised by the courts:

This combination of functions allows them to manage rather than merely adjudicate disputes, and to respond actively to issues, such as power imbalances between the parties or the under-representation of certain interests not ordinarily addressed within the civil justice model.¹¹

In addition, administrative agencies are more flexible and open to innovation than their judicial counterpart. For example, they provide greater third-party participatory opportunities than courts.¹²

On the other hand, human rights commissions, like all administrative agencies, lack the constitutional safeguard of judicial independence and some of the procedural safeguards of the court. As a result, they are subject to the criticism that they provide "second-class justice".¹³

It is also important to note that the interpretation and application of human rights takes place in a number of other settings, such as through the labour arbitration process, in organizational settings such as workplaces and universities, and in other administrative contexts.¹⁴ In fact, many important developments have occurred in these settings which "fly below" the more formal legal institutions.¹⁵

¹¹Martha Jackman, "The Reallocation of Disputes from Courts to Administrative Agencies" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1997) 347-380, at 351.

¹²See generally on this point, John Frecker, "Administrative Tribunals and Access to Policy Development" (1992) 6 *Canadian Journal of Administrative Law and Practice* 69; H.N. Janisch, "Administrative Tribunals in the 80s: Rights of Access by Groups and Individuals" (1981) 1 *Windsor Yearbook of Access to Justice* 303. Although this potential may be more true in theory than in practice, particularly in the human rights context.

¹³Jackman, "The Reallocation of Civil Disputes", at 360. Jackman notes that the view that administrative rulings are less authoritative than judicial ones and that administrative tribunals are an inferior and less desirable forum for dispute resolution represents a significant obstacle to any effort to transfer civil disputes now before the courts to administrative agencies. This same charge of "second class justice" is made with respect to all informal methods of dispute resolution. See the discussion below.

¹⁴For example by umpires under *Employment Insurance Act*.

¹⁵Comments made by Elizabeth Shilton in a workshop on "Using the Master's Tools: Whether and When Equality Activists Should Choose Rights Litigation to Advance Egalitarian Change" at national forum on *Transforming Women's Equality*, 1999).

While the operation of these human rights fora are outside the scope of this study, the importance of these sites should not be underestimated. In particular, the relationship between the formal legal institutions and these other fora should be highlighted. It is a two way street. Decisions made in these fora are clearly influenced by authoritative statements of human rights law made by the courts and human rights tribunals. In some cases, these decisions are subject to review by either the human rights commissions¹⁶ or the courts. At the same time, innovative interpretations and applications of human rights norms that arise in these intensely factual disputes inform and enrich the often more abstract pronouncements of principle made by the courts and tribunals. The dynamic of human rights can therefore be conceived as a bottom up as well as a top down process. A consideration of these dynamics is taken up to a limited extent in subsequent chapters.

2.3 Main Criticisms of the Courts, Human Rights Commissions and Litigation/Settlement Processes

This section provides a brief overview of the main criticisms of the courts, human rights commissions and litigation/settlement procedures. It is organized under three headings: issues of legitimacy and appropriate role; functional critique; and, the potential of informal resolution processes.

A. Issues of Legitimacy and Appropriate Role

Debates over the legitimacy of judicial review of governmental action have been central in the US for many years and have been imported into Canada since the advent of the Charter, not always with adequate attention to the nature of the difference between the two legal systems. Recently, these

¹⁶In the sense that although there is not necessarily a direct appeal or review process, some of these complaints can also be brought to a human rights commissions if the complainant is unsatisfied with the result in the original process.

debates have also come to the fore in the United Kingdom and Australia as judicial enforcement of human rights has increased and debates over the merits of a constitutional bill of rights have been renewed.¹⁷

At the present time in Canada, there is an overlay to this discussion being played out as a political debate, screaming in the headlines of the papers and on call-in talk shows. At this level, the charge is that judges have "chosen" an inappropriately activist role in response to the enactment of the Charter and that this new role has radically altered the relationship between legal and political institutions.¹⁸ It is an emotive debate, with the very idea of 'judicial activism' itself encompassing a pejorative meaning. Other colourful language which is part of the current debate includes that the charge that the courts are "usurping" the rightful role of legislators.

The central debate on the judicial role in interpreting and applying human rights is over the legitimacy of constitutional review of legislation. This is presented as a clash between parliamentary and judicial supremacy. At one level this debate is characterized in terms of judicial activism versus judicial restraint. At a second level, it is characterized by differing approaches to the appropriate role of the courts vis-a-vis other institutions within a democracy. The underlying concern is with the nature of limits to judicial review.¹⁹ This concern is particularly acute with respect to rights adjudication because the concepts and language of human rights appears to be more open-ended than other legal rights.²⁰

¹⁷The United Kingdom has adopted a statutory bill of rights, the *Human Rights Act 1998* which "for the first time incorporates rights into UK law" Anne Owens, "Foreword: Legislating for Rights" in Jonathan Cooper and Adrian Marshall-Williams, eds., *Legislating for Human Rights. The Parliamentary Debates on the Human Rights Bill* (Oxford: Hart Publishing, 2000) at ix. This volume contains excerpts from the Parliamentary debates which provide a unique perspective on the respective roles of Parliament and the courts.

¹⁸F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000). The authors argue that the Supreme Court has adopted an activist stance that does not inevitably flow from the adoption of the Charter of Rights.

¹⁹Patrick Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987), at 30.

²⁰However, this point is debatable since many legal concepts founded in equity and the common law are also open-textured. For a discussion on the similarity of Charter and common law interpretation see Kent Roach, "Constitutional and Common Law Dialogues".

(i) Judicial activism and restraint

The role of the courts in rights adjudication has been roundly condemned as "judicial activism" by critics on the left, centre and right of the political spectrum. Despite its widespread currency, there is no one single definition of the term judicial activism. In the Oxford Companion to the Supreme Court of the United States 'judicial activism' is defined as "the charge that judges are going beyond their appropriate powers and engaging in making law not merely interpreting it".²¹ In other commentaries, judicial activism is seen as a neutral and descriptive phrase rather than a purely pejorative one. This suggests that sometimes making law is viewed as appropriate for the courts. Another definition suggests that activism is "control or influence by the judiciary over political or administrative institutions, processes or outcomes."²²

A distinction has been drawn between "negative judicial activism" which is the failure to apply law in its plain and stipulated meaning, and "positive judicial activism" which is making a judicial decision, either in a particular instance or through the creation of a ruling which becomes a precedent, which is not warranted by existing authoritative legal texts. Negative judicial activism is failure to apply the law; positive judicial activism is the creation of new law.²³

The flipside of activism is judicial restraint in constitutional cases, which is a distinctive disposition towards the judicial role. Restraint encompasses three general principles: deference (judges should avoid contradicting the decisions of other branches of government); reticence (judges should avoid making moral and perhaps political, social and economic choices); and, prudence (judges should avoid making decisions which will impair their capacity to make other decisions).²⁴

²¹Roach at 454.

²²B.Galligan, "Judicial Activism in Australia" in *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991) ed. Kenneth M. Holland 70. This is similar to Richard Posner's definition in *The Federal Courts* (Cambridge, MA: Harvard University Press, 1996), at 318-20.

²³Campbell, "Democratic Aspects of Ethical Positivism", at 14.

²⁴Posner, *The Federal Courts*, at 314-44.

In general, judicial restraint encompasses avoidance of purely political assessments and purely policy assessments and remedies requiring supervision. It also incorporates a dedication to "textualism" or the plain meaning of provisions, deference to administrative decisions, and a restrictive interpretation of individual rights.²⁵

The political nature of this definitional debate is highlighted by many commentators. The deferential approach tends to imply a narrow construction of individual constitutional rights, for an expansive interpretation of individual legal rights is often seen as the hallmark of activism.²⁶ However, lack of deference to legislative objectives can also be combined with a conservative philosophy to frustrate social justice reforms. The most famous example of this is the US Supreme Court's treatment of the "New Deal" legislation. Further examples can be found in some of the Canadian judicial decisions concerning sexual assault law reform designed to take into account women's equality rights.²⁷

The fact that the term judicial activism does not coincide with a particular political perspective is highlighted by the fact that the term is used by various critics of judicial actions across the political spectrum, from those who actively support social justice goals and those that do not. At bottom, the activist epithet expresses a concern that rights discourse is playing too great a role within the political system and society and that this has expanded the role of the courts.

At this level, the judicial activism critique is a mask for fundamental disagreement with the idea of constitutional human rights. In the Canadian context this argument is most vigorously put forward

²⁵John Daley, "Defining Judicial Restraint" in *Judicial Power, Democracy and Legal Positivism* 279-314. He outlines the various practical elements of doctrines of judicial restraint at 280-286.

²⁶The two are linked in the various works published by Morton and Knopff's discussed below. For a discussion and critique of this tendency see also, Michael Kirby, "Judicial Activism" (1997) 27 *Western Australian Law Review* 12.

²⁷*R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577; *R. v. O'Connor*, [1995] 4 S.C.R. 411. See discussions in: Elizabeth Sheehy, "Feminist Argumentation in the Supreme Court of Canada in *R. v. Seaboyer*; *R. v. Gayme* the Sound of One Hand Clapping" (1991) 18 *Melbourne Law Review* 450; Sheila McIntyre, "Sexual Politics at Century's Turn" and Christine Boyle, Lee Lakeman, Sheila McIntyre and Elizabeth Sheehy "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" papers presented at national forum on *Transforming Women's Future*; Kent Roach, "Constitutional and Common Law Dialogues" at 524-530.

by Morton and Knopff and their colleagues.²⁸ From this perspective, the prospective aspect of human rights is highly problematic: "How can a society simultaneously agree upon and endlessly dispute its foundational norms?"²⁹ They argue that the way the Charter has been interpreted and applied has:

...inverted the traditional understanding of constitutionalism and judicial review as conserving forces and transformed them into instruments of social reform. Rather than serving as a prudent brake on political change, the judiciary has become a catalyst for change.³⁰

While this group of scholars has provided the most vigorous critique of the Supreme Court of Canada's Charter role, similar critiques have been proffered by others.³¹ In fact, similar criticisms of the negative impact on Canadian democracy of the "judicialization" or "legalization" of Canadian politics through Charter adjudication have been made by several progressive scholars who would reject Morton and Knopff's clearly conservative views on the substantive issues raised in Charter cases.³²

By contrast legal scholars who support a greater role for rights within the Canadian polity argue that the courts and particularly the Supreme Court of Canada, is doing just what it is supposed to.³³ From this perspective, others have argued that if anything the Court could be faulted for not being active enough and that the courts in general have been very deferential to the legislatures.³⁴

²⁸Morton and Knopff, *The Charter Revolution*; Rainer Knopff and F.L.Morton: *Charter Politics* (Scarborough, ON: Nelson Canada, 1992). Related works include: Leslie Pal, *Interests of State: The Politics of Language, Multiculturalism and Feminism in Canada* (Montreal/Kingston: McGill University Press, 1993); Ian Brodie and Neil Nevitte, "Evaluating the Citizen's Constitution Theory" (1993) 26 *Canadian Journal of Political Science* 235; Ian Brodie, "The Court Challenges Program" *Law, Politics and the Judicial Process* ed. F.L. Morton (Calgary: University of Calgary Press, 1992) 224; Neil Nevitte, *The Decline of Deference* (Peterborough, ON: Broadview Press, 1996). In the preface to *The Charter Revolution*, Morton and Knopff acknowledge the assistance of a number of M.A. and Ph.D candidates whose work they have drawn upon.

²⁹Morton and Knopff, *The Charter Revolution*, at 35.

³⁰*Id.*, at 41.

³¹See for example, Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McLelland and Stewart Inc., 1993).

³²See for example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* Rev. ed. (Toronto: University of Toronto, Press, 1994) and the works by Bakan, Glassbeek and Fudge cited in Chapter 1 on the critique of rights.

³³Lorraine Weinrib, "The Activist Constitution" *Policy Options* (April 1999), 23.

³⁴This is Patrick Monahan's conclusion based on his studies of Supreme Court of Canada cases, "Constitutional Cases, 1991-98" and "1998 Constitutional Cases: An Analysis of the 1998 Constitutional Decisions of the Supreme

Ultimately, the debate over judicial activism can only be characterized as an obstacle to developing a nuanced understanding of the role of the courts with respect to human rights. However, this debate points out two deeper concerns. First, the concern is that rights discourse is displacing other discourses. Secondly, the issue is that increasingly this discourse is undertaken not within the confines of a democratically elected and politically responsible assembly, but within courts and other judicial institutions. These latter institutions, while integral to the democratic process, are seen as nevertheless undemocratic in that they are unelected as well as not responsible to the public in the traditional meaning of the term.³⁵ This latter point merits further exploration.

(ii) Judicial function within a democracy

There is a broad spectrum of views on the appropriate role of the courts within the context of today's democracies. At a populist level, many people view impartial judiciaries as better sources of law than representative legislatures.³⁶ The public view that judges are better placed to make good law than politicians takes us to the core of the democratic debate. There are three main perspectives on this issue. These are seeing judicial review: as anti-democratic; as enhancing democracy; or as playing a distinct, but complementary function to political institutions within a democracy.

a. Judicial review as anti-democratic

Critiques from the left, centre or right of the political spectrum focus on the same concern that the "legalization" or "judicialization" of politics results in the bypassing of electoral processes and/or popular political action and thereby threaten democracy. This trend is seen to be abetted by the "abstract" and "indeterminate" language of human rights which provide insufficient restraint on the judiciary.

Court of Canada (Professional development Programme, Toronto, April, 1999) quoted in Janice Tibbets, "Top court judges shy away from rewriting law: study" *National Post*, 9 April 1999, at A4.

³⁵Howe and Johnson, *Restraining Equality*, at 151.

³⁶Campbell, "Democratic Aspects", at 28.

The core issue is: why should a statute's constitutionality be determined by the moral beliefs of such a small number of judges rather than by the moral beliefs of the much larger number of legislators and citizens? From this perspective, judicial review involves placing important decisions in the hands of a non-elected elite whose decisions are by definition anti-majoritarian. This issue is characterized in terms of who should have the ultimate decision-making authority, the right to the final word in a legal system.

The concerns over limiting the role of the courts is exacerbated by definitions of what is at stake in these cases. This is important because "almost all serious moral and political controversies in contemporary Western societies can be understood as disagreements about rights."³⁷ Thus, judicial review of legislative action is seen as involving "a massive transfer of political power from parliaments to judges."³⁸ The view is that in healthy democratic society, cases of clear and extreme injustice are rare and therefore whether a law violates some basic right is open to reasonable arguments on both sides. These decisions should be left to elected representatives because "[T]he whole point of having a democracy is that, in these debatable cases, the opinion of the majority, rather than an unelected elite, is supposed to prevail."³⁹

These arguments are reinforced by the view that legislatures are in a better position to assess current values. Within this approach, the ideal of citizen participation is seen to be through elected representatives. A related concern is that constitutional review weakens legislative and public debates because they are fundamentally altered and circumscribed by "rights talk."⁴⁰

³⁷Jeffrey Goldworthy, "The Philosophical Foundations of Parliamentary Sovereignty," in *Judicial Power, Democracy and Legal Positivism*, 229-250, at 230.

³⁸*Ibid.*

³⁹*Id.*, at 245.

⁴⁰See for example, Morton and Knopff, *The Charter Revolution* at 155-58.

b. Judicial review as enhancing democracy

On the other hand, supporters of constitutional review see the requirements of effective deliberation and public criticism inherent in the judicial review of governmental action as an essential part of the democratic process. From this perspective, a broad and effective system of judicial review enhances democracy.⁴¹

This perspective involves a shift in the conception of democracy to integrate the rule of law and constitutionalism as fundamental aspects of the system. These fundamental tenets are directly linked to the assumption that judicial enforcement of fundamental principles is necessary in any society committed to democracy and human rights. For many people, these concepts require legislative power to be subject to constitutional limits enforceable by an independent judiciary. This is the very essence of constitutionalism.⁴²

From this perspective, the justifications for judicial review include the fact that the constitutional provisions were themselves democratically promulgated and that review is required to cure defects in the democratic system.⁴³

c. Judicial review as serving a distinctive but complementary function

A third approach to reconciling the role of judicial review of governmental action in a democracy is founded on the idea that the judiciary plays a distinctive but complementary function to that of the legislature.

⁴¹Monahan, *Politics and the Constitution*; Roach, "Charter and Common Law Dialogues".

⁴²Trevor Allan, *Law, Liberty and Justice*, 16.

⁴³John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980). Ely refers to his theory as a "representation-reinforcing theory of judicial review".

Judges are in a very different position from legislators. This differentiation can be seen on a number of levels: informational, methodological, normative and procedural.⁴⁴ The judicial and legislative functions can be distinguished in terms of the sources and types of information upon which decisions are based, procedures for consideration of this information, as well as the reasoning processes and forms of decision. This means that, even if courts, drew on all the same sources as legislatures, executive agencies and other governmental decision-makers, it might nevertheless be the case that different results would ensue.

Much of this debate over the appropriate role of the courts is taken up with different perspectives on whether or not there is a distinct judicial methodology or legal reasoning. The contrast is between legal positivists who see the court's role as one of applying rules in accordance with the plain and stipulated meaning and legal realists who see judging as a fundamentally interpretive act. In the context of human rights adjudication, the argument is that these norms are too indeterminate to provide sufficient limits to the judicial function.

Framing this debate in terms of complementary institutional functions leads into discussions about the relative capacity of courts and other institutions. This is not a particularly vocal or well-developed aspect of the current debate over judicial activism. However, in my view it should be the central focus. Most often these issues get translated into fairly narrow criticisms of the current functioning of the courts. This functional critique is outlined in the next section. The broader issues of institutional capacity are taken up later in this chapter.

(iii) The Legitimacy of Human Rights Commissions

The judicial activism debate is centered on the problem of the courts' application of human rights norms in a way that circumscribes legislative action, and in Canada is focused to a large extent on Charter litigation. However, this debate has important spillover effects to a range of other areas.

⁴⁴Frederick Schauer, "Legal Positivism and the Contingent Autonomy of Law" in *Judicial Power, Democracy and Legal Positivism* 215-228, at 221-223.

For example, similar concerns over the inappropriate judicial role in litigation limiting corporate policies and practices has resulted in calls for tort reform in the US.⁴⁵

The legitimacy critique relates, at least in part, to a more general concern that the focus of debate on the public good has moved away from legislative bodies, political parties, and the interactions of governments and interest groups in the shaping of public policy and increasingly towards commissions, tribunals and courts. Because human rights bodies are charged with enforcing rights and remedying wrongs, in a society marked by rights consciousness, they have become key players.

The work of the commissions does not raise the same legitimacy issues as the courts since they are clearly statutory bodies carrying out a task assigned by governments. Nevertheless, questions as to their appropriate and legitimate role are continually raised and there is not always a clear consensus on what commissions do or should do. Specific cases tend to garner negative publicity which can result in calls for limiting the role of human rights commissions and tribunals. In addition, there have been some calls for "dismantling" the commissions because they have overstepped their mandates.⁴⁶ However, for the most part the criticisms remain in the context of the critique of the operation of the commissions rather than the institution themselves.

While there is general public support for the underling purposes of the human rights commissions and the need for individual complaints procedures to remedy discrimination, legitimacy issues arise more clearly with respect to the commissions' broader functions of promoting equality. It appears as though there is at most a partial social consensus on the nature and appropriateness of this role. While rights advocates push for stronger powers, policies and programs, many other individuals and associations resist these developments.⁴⁷

⁴⁵Although the issue is more complicated in this context since it is not simply the courts, but also lawyers and juries who are criticized for their "activism".

⁴⁶See for example, Globe and Mail editorial on CHRC by John Hunter, June, 2001. Articles on BCHRC on sexual harassment cases 1999.

⁴⁷Howe and Johnson, *Restraining Equality*, at 129 and *passim*. The authors conducted extensive interviews of both human rights commission officials, rights advocates, the "respondent community" (for the most part businesses), and

These recurring questions about the extent of the role of human rights commissions are muted by comparison with the lavish attention paid to the role of the courts. Nevertheless, they can be understood within the context of an uncertain public consensus as to the legitimate role of state institutions in helping to order so-called "private" relationships. The legitimacy of this role depends on a clear understanding of, and support for, the public interest in a society whose operations are consistent with human rights norms. However, support for the protection and promotion of human rights does not always translate into support for the institutions and processes developed to accomplish this task. This relationship between legitimacy of an institutional mandate and the way in which this mandate is carried out leads to a consideration of issues concerning the functioning of legal institutions.

B. The Functional Critique

The first strand of the current problematique of the role of the courts and human rights commissions seeks to clarify the appropriate, legitimate role for these legal institutions within democracy. The second strand accepts as given these roles but provides a critique of the ways in which these institutions function. These two strands are interconnected. The main themes raised in functional critiques of the courts and human rights commissions are outlined in the next two sections.

(i) The courts

The functional critique of the courts considers how these institutions operate, both generally and specifically with respect to rights adjudication. The nature of the criticisms differ depending on one's position within the judicial and administrative systems. The legal institutional perspective and those of professional participants is quite different from those of rights advocates, individuals and groups who seek to have their rights vindicated, and those placed in a position of responding to or defending against a particular interpretation and application of rights.

government officials on this point during their research and note the wide range of views on the mandate of human rights commissions.

a. The managerial perspective

In the last few decades, the courts have come under scrutiny as concerns over access to the civil justice system, usually envisioned as problems of delay, high cost and complexity of procedure, have grown. Provincial governments, bar associations and law societies and the courts themselves have been active in investigating these problems and implementing reforms.⁴⁸

The Canadian Bar Association's Systems of Civil Justice Task Force reported on these issues from a national perspective.⁴⁹ It found that barriers to access caused by delay, cost and lack of understanding are a result of a number of interrelated factors. In particular, the Task Force found that impediments to access are systemic in nature. The systemic barriers identified include: lack of a sufficient user orientation, complexity and inflexibility, the impact of traditional approaches to litigation, inadequate management tools and resources, and insufficient accountability and transparency.⁵⁰

Both the Canadian Bar Association Task Force Report and other court reform reports consider these problems as malfunctions within the system attributable for the most part to insufficient resources and/or ineffective management techniques and systems. Both the problem and the solutions are seen from this managerial perspective. This perspective tends to focus on problems within the civil justice system per se, ignoring the important socio-economic factors that operate in society at large and hinder access to the courts.

⁴⁸For an overview of these reports and related civil justice reform research see Melina Buckley, *Civil Justice Reform: A Survey and Analysis of the Literature* (Ottawa: Canadian Bar Association, 1996) and Thomas Cromwell, "Dispute Resolution in the Twenty-First Century" paper presented at a national conference *Civil Justice: Reform for the Twenty-First Century* sponsored by the Canadian Bar Association's Systems of Civil Justice Task Force, Toronto, February 1996.

⁴⁹Report of the Canadian Bar Association Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996).

⁵⁰*Id.*, at 17.

Only a few reform developments seek to introduce a new approach to the current litigation procedures or to suggest the need for reform outside of court-controlled processes. The major departure is the integration of more informal settlement procedures as part of the litigation process. As part of these developments, court reform measures have also acknowledged the need to modify judicial and legal culture in support of such innovations.

None of these studies or recommendations for reform address the specific requirements of human rights adjudication. This flows from the basic orientation that the same procedures are applied in all civil matters. However, departures from this unitary approach have been made in some substantive areas in order to better address the parties' needs or in order to promote the development of judicial expertise. For example, specialized courts and/or specialized procedures have been developed in the areas of small claims court, family law, commercial and tax law.⁵¹

b. The rights advocacy perspective

This managerial definition of the problems relating to the functioning of the courts can be contrasted with the approaches taken by rights advocates. There is no one approach as advocates of social justice and equality goals are divided between those who support the potential of rights litigation and those that see it as naive and futile, and hence a wasteful diversion of limited human and financial resources. It is from this perspective that the serious barriers to access to justice, neglected in the managerial approach, are highlighted.

Those who oppose litigation strategies as a means to achieving social justice argue that courts are unable to escape the power structure within Canadian society. Rights adjudication is a doomed enterprise since it will "unavoidably prove an unequal resource in an unequal society serving

⁵¹Reforms have also been implemented in some jurisdictions in order to offer expedited and simplified procedures for "middle range" cases (mostly defined in terms of the amount of money sought to be recovered). See discussion in *Systems of Civil Justice Task Force Report*, at 41.

ultimately to augment existing social, political and economic inequalities".⁵² From this perspective, even where it is possible to use litigation to advance creative progressive claims, they will disproportionately be used to shore up the status quo of inequality.

Rights advocates also have other more specific concerns with the functioning of the judicial system. These include that litigation: forces one to be conservative in the approach to remedies; submerges political claims in the abstract discourse of rights; and reinforces the public/private distinction.⁵³ From this perspective, rights enhancing strategies should focus on political struggle rather than legal strategies.

Other rights advocates share these concerns over the limitations of the judicial system but conclude that they do not have the luxury of giving up any of the tools available to fight for social justice.⁵⁴ As a result, they proffer specific criticisms of the rights adjudication process with a view to making it more effective. From this perspective, courts are criticized, for example, for being overly legalistic, for having insufficient regard to social and political considerations, and for not articulating the real factors that produced their decisions. Although these criticisms go far beyond the modest approaches framed by the managerial perspective, they are nevertheless ones that could be the subject of reform of the litigation process and in particular, in approaches to judicial decision-making.

The managerial focus frames reform of the courts in quantitative terms, that is with a view to finding ways for the courts to deal with cases more efficiently. The rights advocates focus is more qualitative, that is enhancing the fairness of both procedures and outcomes.

⁵²Bakan, *Just Words*, at 58.

⁵³See discussion in Chapter 1 on the concerns with rights litigation.

⁵⁴This was the overwhelming view of participants in the workshop on "Using the Master's Tools" presented by Aylward, McIntyre, and Shilton at the national forum on *Transforming Women's Futures*.

(ii) Human rights commissions

The first level of the functional critique of the human rights commissions deals with the handling of human rights complaints. This critique is indistinguishable in many respects from that of courts discussed above. It centers around issues of delay, cost and accessibility.

From the perspective of the commissions, the biggest cause for concern is with delay. This problem has been highlighted in several recent cases including in the Supreme Court of Canada's decision in the *Blencoe* case.⁵⁵ Anxieties about delay have been the driving force of many reforms over the last decade or more. In particular, renewed emphasis on informal methods of settlement have been focused on addressing timeliness. The enforcement process is dependent on settlements because it would be hopelessly overloaded if all cases that are settled under current practices, went to hearing.

While other participants in the human rights claims process, claimants and respondents, share these concerns with delay, they have also criticized the process for being procedurally and/or substantive unfair.⁵⁶ One concern is that the emphasis commissions place on settlement can create undue pressure on the parties to settle. Other concerns raised about the investigation/ conciliation processes have included: conflict of interest; bias; incorrect interpretations or applications of the law; trivializing human rights issues by not treating with an adequate level of seriousness; and, conversely, aggrandizing "people problems" into constitutional-style litigation.⁵⁷

⁵⁵*Blencoe v. BC (Human Rights Commission)*, [2000] 2 SCR 307.

⁵⁶See: Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Ministry of Citizenship, June 1992) [hereinafter referred to as "*the Cornish Report*" after the Task Force Chair, Mary Cornish] at 20-28; British Columbia Human Rights Review, *Report on Human Rights in British Columbia* (Victoria: Government of British Columbia, December 1994) [hereinafter referred to as "*the Black Report*" after the Bill Black, the Special Advisor to the Minister Responsible for Multiculturalism and Human Rights] at 25-8; Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision 2000* (Ottawa: Canadian Human Rights Act Review Panel under the authority of the Minister of Justice and the Attorney General of Canada, 2000) [hereinafter *CHRA Review Panel Report*] at 46-49.

⁵⁷*Ibid.*

A final set of criticisms relate to lack of accessibility to the complaints process. This concern is voiced in general terms with respect to the "gatekeeping" function that commissions play since it can dismiss complaints without a determination on the merits.⁵⁸ It is also made more specifically with respect to the distinctive barriers faced by some groups in accessing commission processes.⁵⁹

Most Canadian human rights commissions have been engaged in seemingly endless attempts to study and reform the complaints handling-process as evidenced in the large number of reports on this subject.⁶⁰ For the most part, the reforms suggested are within a fairly limited, defined scope of change. For example, common to all of these reports have been recommendations that rights policy be taken more seriously by governments; that public education programs be expanded; that the scope of rights protections be enlarged; that commissions be given stable and enhanced funding; that the problems of case delay be addressed through improved managerial techniques; and that permanent adjudicative tribunals be created based on the federal and Quebec models.⁶¹

A second level to the functional critique moves away from the complaints handling function to the way human rights commissions are carrying out their other duties. In particular, the concern is that there is a lack of balance between addressing individual complaints and broader, systemic issues.

⁵⁸According to Howe and Johnson, this was a particularly great problem in the early to mid 1990s when the numbers of cases rose far beyond the capacity of many commissions. For example, the Nova Scotia Human Rights Commission had to prioritize certain types of cases and not deal with others (Howe and Johnson, at 17). however, many see this as an ongoing concern see for example Lucie Lamarche (avec la collaboration de Frederique Poirier, *Le regime quebecois de protection et de promotion des droits de la personne* (Cowansville, QC: Les editions Yvon Blais Inc. 1996) and Shelagh Day and Gwen Brodsky, *Screening and Carriage: Reconsidering the Commission's Functions* (research paper commissioned by the CHRA Review Panel, 1999).

⁵⁹For example, the BC Human Rights Commission is examining the causes of the relatively low number of race-based complaints.

⁶⁰In addition to reports cited above, see: Alberta Human Rights Commission, *Equal in Dignity and Rights: A Review of Human Rights in Alberta by the Alberta Human Rights Review Panel* (Edmonton: 1994); Charles Ferris, *Towards a World Family: A Report and Recommendations Respecting Human Rights in New Brunswick* (Fredericton: 1989); Saskatchewan Human Rights Commission, *Renewing the Vision: Human Rights in Saskatchewan* (Saskatoon: 1996) [hereinafter SHRC Report]. See also, William Black, *Reassessing Statutory Human Rights Legislation Thirty Years Later: Human Rights Enforcement in BC: A Case Study* (Ottawa: Human Rights Research and Education Centre, 1995).

⁶¹This is the summary of these reports provided by Howe and Johnson, at 109. For a discussion of the recommendations concerning mediation in the complaints process see Chapter 4 and with respect to systemic approaches in Chapter 5.

The nature of the problem was expressed in these terms by an advocacy group in hearings about reform of the operation of the *Canadian Human Rights Act*: that "resources are currently being diverted from the more systemic-oriented tasks of the Commission to complaint investigations. This reactive method is a bottomless pit."⁶² The recommendation is that much more needs to be done by the commissions using their proactive powers of advocacy, initiating complaints, intervening in specific complaints in the public interest and in carrying out public inquiries.⁶³

C. Adversarialism and the Potential of Informal Dispute Resolution

Many of the criticisms of the litigation system in Canadian and other Anglo-American jurisdictions arise from a dissatisfaction with the underlying philosophy of the litigation system, that is adversarialism. At the same time, there is a high level of resistance to, and criticism of, attempts to integrate non-adversarial or informal dispute resolution mechanisms into the process of interpreting and applying human rights. These two critiques are outlined in this section.

(i) The Critique of Adversarialism

The tenets of adversarialism gives rise to a "legal model" for resolving disputes which operationalizes the rule of law through an orderly process and procedures designed to guarantee a fair hearing.⁶⁴ While the courtroom trial is the epitome of this model, it is also applied albeit more informally by some administrative tribunals, including human rights tribunals, as well as in other fora such as disciplinary hearings in the workplace. Regardless of the situation, it is the following pattern of activity and approach that constitutes the legal model:

⁶²Canadian Ethnocultural Council Submission quoted in *CHRA Review Panel Report*, at 13..

⁶³Reform reports are more innovative in their consideration of this aspect of the commissions' functions relative to their approach to reform of the complaints-handling process. These are discussed in Chapter 5.3(B).

⁶⁴Patricia Hughes, "Workplace Speech and Conduct Policies: Reconsidering the Legal Model" (1998) 77 *Canadian Bar Review* 105.

...the systematic process of allowing "each" party to make his or her case and then allowing the other party to respond; the sifting of the information presented to determine its "legal" relevance to a complaint that has been made according to predetermined categories of allowable complaints under the policy; the reaching of a conclusion and granting of a remedy within specified bounds. It is based on an "adversarial relationship" in which one party asserts wrong-doing and the other defends him or herself.⁶⁵

While the benefits of this system include consistency, predictability of result and impartiality, there are a number of disadvantages to the adversary system. In particular, this approach to resolution leads to: a focus on procedure rather than substance or outcome; limitations on methods of presenting and sharing information; a limited view of potential solutions; and the spill-over effect of an adversarial approach taken in non-adversarial procedures.⁶⁶

Research has demonstrated that the adversarial process limits sharing of information and distorts communication in numerous ways including by:

- making extreme claims,
- avoiding potentially "harmful" facts,
- refusing to acknowledge any truth in the opposition,
- limiting story telling to two, rather than allowing for a multiplicity of stories,
- refusing to share information or conversely by strategically giving or demanding too much information,
- manipulating information (as in the "battle of the experts"), and
- making the true look false (cross-examining a truthful witness) or the false look true (by offering false or misleading evidence or by actively "coaching" witnesses).⁶⁷

The adversarial system also has a negative impact on the development of solutions: "it may be because litigation negotiations are so often conducted in the shadow of the court that they are

⁶⁵*Id.*, at 106.

⁶⁶Carrie Menkel-Meadow, "The Trouble with the Adversary System in A Postmodern Multicultural World" 38 *William and Mary L. Rev.* (1996) 5.

⁶⁷*Id.* at 21-22 (footnotes omitted from quote).

assumed to be zero-sum games".⁶⁸ The predictable result is that the search for solutions is characterized by linear-thinking, unproductive competition, assumption of universal applicability of rules, competitive reactive dynamics (rather than creative proactive dynamics), erroneous assumptions (i.e. that the conflict has a zero-sum nature or that parties value the fixed resource equally), polarized results, and limited canvassing of options.⁶⁹

The negative impact of adversarialism is widespread and both reflects and reinforces the ascendancy of distributive and competitive approaches that operate more generally within society. For example, the adversarial nature of the legal culture has had a profound impact on the implementation of non-adversarial approaches to dispute resolution because many lawyers continue to operate within adversarial norms regardless of the setting.⁷⁰ The preoccupation with gaining advantage through an adversarial approach too often has the result of displacing communication, common sense and a problem-solving orientation, all of which assist in resolving disputes.⁷¹

The concerns about adversarialism may be heightened in the context of rights adjudication, or at a minimum different considerations may be at play in constitutional litigation by comparison with its private counterpart. The limitations on a court's ability to deal with various forms of evidence is highly problematic given, for example, the need for contextualization in order to properly ascertain an equality rights claim. Similarly, a limited ability to formulate remedies is especially troublesome in rights adjudication where there is a strong requirement for framing innovative solutions to often novel legal issues.

In addition to these important practical issues, at a more fundamental level, the win-lose philosophy of adversarial adjudication may not be suited to determining and applying rights.⁷² In many cases,

⁶⁸Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 *UCLA L. Rev.* 754, at 766.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

⁷¹*Systems of Civil Justice Task Force Report*, at 18.

⁷²Robin Sharma, "The Adequacy of the Adversarial System in Charter Litigation" (1993) 3 *NCJL* 99, at 113-6. Despite the critique made in the article, the author recommends reforming rather than abandoning the adversarial system

all parties need to be involved in applying a given rights norm in a way that works. Put even more broadly, the question is whether "truth attainment", which is the goal of the adversarial system, is the paramount goal of human rights adjudication.⁷³

This critique leads to recommendations to abandon or limit rights adjudication. Alternatively, the conclusion is that the adjudication process should be radically altered. Fundamental reforms that have been proposed include more inquisitorial models, like those employed by continental European constitutional courts and more participatory, non-adversarial models mainly found in non-legal settings.

(ii) The legitimacy of informal resolution

Canadian human rights commissions were originally conceived as agencies that would provide an informal conciliatory procedure for addressing complaints of procedures. The initial objectives for these procedures were to educate, change attitudes and reconcile the parties, thereby contributing to the prevention of future discrimination.⁷⁴

The original qualitative objectives of the process have for the most part been supplanted with managerial imperatives to process cases quickly. Nevertheless, the reality of current practice is that the vast majority of human rights complaints settle and that commissions' settlement practices contribute to this settlement rate. In addition, most human rights commissions and tribunals have supplemented their conciliation practices with other informal dispute resolution processes such as early neutral evaluation and mediation.⁷⁵

Despite this orientation and reality, there is strong resistance to informal methods for the resolution

of litigation.

⁷³*Ibid.*

⁷⁴Howe and Johnson, at 26; Tarnopolsky, "The Iron Hand in the Velvet Glove".

⁷⁵See discussion in Chapter 4, section 4.2.B(i).

of human rights disputes. Over the last several decades, human rights agency practices have become more legalized and judicialized rather than less. This is particularly true of the hearing processes. Recently, several recommendations for reform have proposed an increased role for adjudication to resolve human rights complaints. These include recommendations for direct access to tribunal hearings or to the courts directly.⁷⁶ The main change is enhancing party control over the carriage of the case and particularly, over the fact-finding or investigative role. While many of these reform measures also contemplate a continued role for early settlement and a role for mediation, they are generally conceived of as steps in the hearing process rather than as full alternatives to adjudication.

It is important to come to grips with the reasons for the lack of substantial interest in informal processes of dispute resolution, given the original vision for human rights commissions and the concerns that adversarialism may be an appropriate approach to human rights practices. This reticence can be understood as stemming from questions surrounding the legitimacy of informal justice in rights adjudication. This reticence is even greater in the context of Charter litigation where the potential for mediation is seen as a non-starter.⁷⁷

Many theorists begin from the position that informal dispute resolution has no role in the interpretation and application of rights. For example, Dworkin argues that compromising in the interpretation and application of rights in society should never result in compromised rights.⁷⁸ Fiss takes a similar position in his famous article "Against Settlement."⁷⁹ Here, rights are seen as non-negotiable. From this perspective, the clarification of rights can only take place through an

⁷⁶*SHRC Report*, at 58-9; *Cornish Report* at 108; *CHRA Review Panel Report* proposed a new direct access claim model, at 54-73. The possibility of complaints going directly to the Federal Court was raised in *Report of the Auditor General of Canada to the House of Commons - Chapter 10 Canadian Human Rights Commission, Human Rights Tribunal Panel* (September 1998).

⁷⁷One example of this is the funding structure employed by the Court Challenges Program of Canada in its funding of equality rights and language rights test-cases. Whereas funding for negotiation is available and used by language rights advocates, equality rights advocates saw no role for negotiation in s.15 test-cases. This provision was changed in 1998.

⁷⁸Ronald Dworkin, *Taking Rights Seriously*, at 88-90.

⁷⁹(1984) 93 *Yale Law Journal* 1073.

adversarial process in which the impartial decision-maker pronounces on the appropriate interpretation of the human rights norm and its application in a given case.

These principled positions are echoed in functional assessments of the indicators of non-suitability for mediation. Many of these factors are present in human rights disputes. For example, the following factors are said to indicate that issues should not be mediated:

1. There are broad matters of policy at stake affecting many people or the whole society, such as constitutional or human rights issues, or the parties wish to establish an authoritative precedent for future disputes of a similar nature, for example to end a pattern of malpractice in an industry;
2. The dispute cannot be resolved without making complicated findings of fact or credibility;
3. The dispute involves an uncompromising difference over matters of value or fundamental principle which are not susceptible to negotiation; and
4. Where there is a remedy which only a court could provide.⁸⁰

At one level the concern is that mediation or other informal methods will be ineffective because of the nature of human rights disputes. These disputes are characterized by many of the factors associated with decreased probability that mediation will produce agreement. These include: high level of conflict; low motivation to reach agreement; low commitment to mediation; shortage of resources; disputes involving fundamental principles; and parties of unequal power.⁸¹

A related concern is that there is a limited role for informal processes in systemic or group claims. By focusing on grievances between two people, mediation may deflect attention from the more fundamental source of the dispute.⁸²

⁸⁰I have highlighted the factors that are most relevant in human rights disputes from a larger list set out in Laurence Boule and Kathleen Kelly, *Mediation Principles, Process, Practice*, Canadian ed. (Toronto/Vancouver: Butterworths, 1998) at 87-8.

⁸¹*Ibid.*

⁸²Anne Grosskurth, "Mediation: forming a view" in *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (London: Legal Action Group, 1996) 176-187, at 183.

One of the limits of mediation is the sticking-plaster effect, keeping the lid on conflict. You end up with everyone in a block of flats, wearing ear-muffs rather than getting the council to soundproof the building.⁸³

Legal intervention must be based on assisting in solving the problem for all the affected parties, and not necessarily just those at the table.

Some go so far as to argue that informal processes such as mediation are antithetical to the enforcement of rights and to social change. The underlying concern is that people would make deals which benefit the negotiating parties at the expense of society, in what might be termed a 'win/win/lose' solution.⁸⁴ There is a substantial critical literature along these lines particularly with respect to community mediation initiatives.⁸⁵ Skeptics regard mediation and its related processes as instruments of social control.⁸⁶

In addition, litigation has an important symbolic as well as practical function.⁸⁷ It is argued that it is only through the authoritative statements by the courts or tribunals that human rights norms develop in order to furnish principles to guide social justice reform within society at large. These functions are not well-served by informal processes.

These points relate to concerns about the substantive fairness of outcomes achieved through informal justice and the important symbolic and public interest functions of human rights adjudication. A whole other set of concerns relate to the question of procedural fairness. These issues include: lack

⁸³ *Id.*, at 184, quoting Andrew Acland.

⁸⁴ Fiss, at 105.

⁸⁵ Richard Abel, "The Contradictions of Informal Justice" and other essays in *The Politics of Informal Justice*, vol. 1 and 2 ed. Richard Abel (New York: Academic Press, 1982) vol.1 267-321; Laura Nader, "The ADR Explosion - The Implications of Rhetoric in Legal Reform (1988) 8 *Windsor Yearbook of Access to Justice* 269; Christine B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport: Greenwood Press, 1985); Peter Fitzpatrick, "The Impossibility of Popular Justice" (1992) 1 *Social and Legal Studies* 199.

⁸⁶ *Ibid.* For a global perspective on this see the work of Sally Engle Merry on this point: "Popular Justice and Social Transformation" (1992) 1 *Social and Legal Studies* 161.

⁸⁷ Thornton, "Citizenship, Race and Adjudication"; Fiss, "Against Settlement".

of procedural safeguards; the lack of access to mechanisms for fair disclosure of information; and concerns over power imbalances.⁸⁸

It is important to recognize that competing claims are made for informal processes that counter all of these criticisms. For example, there has been much success with mediation of broad policy concerns through an inclusive process.⁸⁹ Similarly many mediation programs have developed effective mechanisms to address fairness concerns.⁹⁰ However, the purpose of this section has been to deal with the basis for reticence in applying informal resolution models in the human rights context.

This discussion has provided a broad outline of the main criticisms of the courts, human rights commissions, and the attendant litigation and settlement processes employed by these legal institutions. It has focused on the controversies over the legitimate and appropriate roles of these institutions and the apparent contradictions between the critiques of adversarialism and of informal resolution processes. The following section revisits and evaluates these criticisms.

2.4 Toward a Reconceptualization of the Role of Legal Institutions in Achieving Social Justice

This section initiates a reframing of the problematique of the role of legal institutions in protecting and promoting human rights within the context of the transformative framework established in the first chapter. This revised problematique is the first step towards a reconceptualization of this role which is taken up in the next chapters.

⁸⁸For an overview of the literature on these issues see Melina Buckley "Human Rights Dispute Resolution Options for the 21st Century: A Policy Framework" (research paper commissioned by the CHRA Review Panel, 2000). These issues are discussed in Chapters 4 and 5.

⁸⁹For example, in the area of environmental issues by the CORE project in Canada and the work of Lawrence Susskind and associates in the US.

⁹⁰See Buckley, *Human Rights Dispute Resolution Options for the 21st Century* at 89-138.

The transformative potential of legal institutions is unnecessarily circumscribed by the narrow way in which their role has been described and further problematicized in the current debate. This is not to say that these critiques are entirely wrong. They are, in effect, partial truths about the current system. However, the limited boundaries of these critiques is rejected in this study.

A. On Legitimacy, Democracy and Capacity

The terms of the judicial activism debate are problematic because they are incoherent. As has been demonstrated, judicial activism and restraint are essentially meaningless concepts that can be used to support contradictory claims. More importantly, these characterizations act as a severe constraint on the quality of the debate on the legitimate and appropriate role of the courts. Often, the underlying concern lies more in the role of rights within a given society rather than with appropriate institutional division of labour.

In the current Canadian context, for the most part charges of activism are a form of backlash against progressive advancements in the interpretation and application of rights. Conservatism is believed to convey an appearance of neutrality and non-activism. Yet, little attention is paid to the fact that, in the process of deferring to the legislature, judges actively produce knowledge that shapes social practices, such as the construction of race and gender.⁹¹

These harsh criticisms of the role of the courts and particularly of the Supreme Court of Canada's record are a way of influencing judicial decision-making. As such, they raise serious concerns for judicial independence. They can be contrasted with criticisms of specific decisions which is a healthy aspect of public discussion. The Supreme Court of Canada has clearly been affected by these charges and has waded into the debate, both in judicial decisions and in contributions to the debate through papers and presentations that have been reported in the media.⁹² These implications underscore the importance of developing and promoting a more nuanced theory of judicial review.

⁹¹Thornton, "Citizenship, Race and Adjudication," at 337.

⁹²See discussion of comments made by the Court in the *Vriend and Mills* case below section 2.4.D(i).

Issues related to the legitimate and appropriate role of the courts cannot be resolved on the basis of doctrines of activism or restraint. This controversy is inherently incoherent and unresolvable since a solution cannot be found within the terms of the debate itself but must come from outside of its term, through a political decision as to the role of the courts.⁹³

Much of the legitimacy critique is carried out on the wrong terrain given that the role of the courts in applying the Charter is clearly set out in the Canadian Constitution⁹⁴ and that these developments were subject to a recent governmental consensus.⁹⁵ The legitimacy of this governmental consensus has been underscored and strengthened by surveys which consistently report strong public support for the Charter and the courts role in interpreting and applying its provisions.⁹⁶ However, this societal consensus does not constitute a full response to concerns about the appropriate role of the courts in democracy, nor to the critique of the growing role of rights discourse.

⁹³P. Brest, "The Fundamental Rights Controversy: The Essential Contradiction of Normative Scholarship" (1981) 90 *Yale L.J.* 1063.

⁹⁴The role of the judiciary is structured through a constitutional framework consisting of five provisions. These are: s.52 which provides for the primacy of the Constitution over any other law; s.32 which states that the Charter applies to governments; s. 24 which sets out the courts' responsibilities and powers with respect to enforcement and remedies of Charter infringements; s.1 which provides for reasonable limits on Charter rights in some circumstances; and s.33 which provides that legislatures can expressly declare that a provision operates notwithstanding certain Charter rights (that is the legislatures can expressly override the rights protected by s.2 (fundamental freedoms) or ss.7-15 (legal rights and equality rights)).

⁹⁵Although the lack of consent of the Government of Quebec to these constitutional developments at the time of repatriation must be acknowledged. Nevertheless, the Quebec Government has promulgated and supported strong provincial human rights legislation, the Quebec *Charter of Human Rights and Freedoms* which covers much of the same Charter and has a much broader ambit than other provincial human rights legislation.

⁹⁶See Joseph Fletcher and Paul Howe, *Public Policy and the Courts* (Kingston: Institute for Research and Public Policy, 2000). This study is based on a poll of over 1000 Canadians conducted in March 1999. Among the survey findings are that 85% of respondents had heard of the Charter and 82% considered the Charter "a good thing for Canada". These levels are basically unchanged from comparable study carried out a decade ago. Support was also very high for the Supreme Court of Canada and more specifically for its decisions in a number of "controversial" cases including an equality case *Vriend v. Alberta* (which is seen as "forcing" the Alberta government to extend human rights protections to sexual minorities). The study concludes that "continued goodwill towards Canada's judicial institutions is understandable, since public disapproval of particular rulings is less widespread than might be imagined and that which does exist has a fairly muted impact on more general attitudes".

The latter critique is founded on a particular view of rights discourse as authoritarian and as having a polarizing and limiting impact on political and public debate.⁹⁷ From this perspective, rights are the anti-thesis of debate because "rights talk acts as an uncompromising language of trumps that does not brook reasonable disagreement."⁹⁸ This concern is shared by some social justice activists who prefer to use alternative formulations such as basic needs or to eschew this approach entirely and use more relational language.⁹⁹

These arguments were dealt with in the first chapter which emphasises the necessity of seeing rights as a social practice. In complete contrast to the view that rights have a single meaning that results in oppositional and silencing dynamics, this study argues that the dynamics of rights involves the concretization of norms in specific circumstances through the development of provisional and situational shared meanings. This is not the zero-sum clash as presented by the critics of rights discourse but rather, an ongoing process of interpretation.

Arguments that judicial review is anti-democratic are founded on a particular view of democracy, one which reduces democracy to government by elected representatives and majority rule. Within this view of democracy, the courts should have a limited role in reviewing legislative action. In contrast, the position that judicial review enhances democracy is premised on an alternative conception of democracy in which deliberation in fora other than representative institutions is envisioned as playing an important and positive role.

There are several approaches to characterizing judicial review within this deliberative democratic understanding all of which place emphasis on the dialogue between legal and political institutions.

These approaches can be placed into three broad categories of dialogic review: (1) those that posit that courts and legislatures have an equal right to interpret the constitution; (2) those which focus

⁹⁷See for example, Knopff and Morton, *Charter Politics*, at 222.

⁹⁸Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

⁹⁹For example, see: Dukes, *Resolving Public Conflict*, at 136-8 and *passim*; J.C.Tronto, "Beyond gender difference to a theory of care" (1987) 12 *Signs* 644. See discussion below Chapter 3, section 3.2.C.

on the ultimate accountability of the Court to the legislatures and society; and (3) those which envision the Court and legislatures as playing distinctive but complementary roles in resolving questions about rights and freedoms.¹⁰⁰ This third category is preferred, both because it accommodates conventional understandings of the judicial process and the rule of law and because "it can produce the most constructive partnership between courts and legislatures":¹⁰¹

It avoids the routine shouting matches and showdowns that are produced when both institutions try to interpret the constitution or respond to the various constituencies of a democracy. It allows courts to educate legislatures and society by providing robust articulations of the values of the Charter and the common law constitution while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives. By allowing courts and legislatures to add their own distinctive voices, talents and concerns to the conversation, a more enriching and sophisticated dialogue is produced than could be achieved by a judicial or legislative monologue or a dialogue in which courts and legislatures engage in the same task.¹⁰²

At present, the problematique is stuck on finding appropriate limits on the role of the courts vis-a-vis the legislature or justifying a larger role in terms set by the narrow terms of the judicial activism debate. This problematique needs to be recast in much broader terms because it has inhibited a meaningful discussion on the relative capacities of the courts and legislatures. In addition, it leaves no room for consideration of the role of other segments of society and fora as sites for human rights practices.

There are some clear differences between the positions of judges and legislators, at least as currently conceived. For example, compared with legislators, judges usually receive a great deal of information about particular cases. They are trained in and employ legal reasoning and must publicly state the reasons for their decisions. Judges are not as subject to political pressure and lobbying and are charged with the responsibility of transcending their personal interests built-in biases rather than

¹⁰⁰Roach, "Constitutional and Common Law Dialogues", at 485.

¹⁰¹*Ibid.*

¹⁰²*Ibid.*

with looking after a certain group's interests or making deals. On the other hand, judges receive less information about society in general. They usually do not hear directly from third parties who will be affected by their decisions (except through interventions). They make decisions in smaller and less diverse groups and are usually chosen with less public scrutiny.¹⁰³

To the extent that these issues of comparative institutional capacity have been raised, it is done in a way that is limited by the current conceptions of the role and operations of the courts. However, institutions are not immutable. As a result, a whole series of interesting questions of institutional design are kept out of the conversation on the potential role of legal institutions in achieving social justice. A particular society can decide what it wishes to make amenable to adjudication and design the most appropriate standards, procedures and institutions for the job.¹⁰⁴

One critical aspect of institutional design which is sometimes recognized in the current problematique is that of the limitations on the evidence gathering and reviewing capacity of the courts. No mechanisms exist to ensure that all available relevant information is before the court, thus allowing it to make a fully informed decision. Judges are not actively engaged in evidence gathering functions. Courts are ill-equipped to deal with new forms of evidence. The costs of adducing evidence in Charter litigation is prohibitive for many parties and intervenors. Under the current problematique, these difficulties are often characterized as a rationale to limit the role of courts. However, under the reconception proposed here, these become important issues of institutional design.

Another important step in this reconceptualization of the potential role of the courts is to directly address the question of whether legal institutions do things differently, and draw on different sources than other decision-making institutions. In other words, is law "in some interesting sense, different from other social and political institutions - what, if anything, do legal institutions do that other

¹⁰³Walter Sinott-Armstrong, "A Patchwork Quilt Theory of Constitutional Interpretation" in *Judicial Power, Democracy and Legal Positivism* 315-334, at 322.

¹⁰⁴Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Dartmouth, 1997) at 26.

institutions do not?"¹⁰⁵ This requires normative questions about how law works and practical questions about the conduct of legislative and adjudicative processes.

In summary, I argue that the problematique of the appropriate role of courts in achieving social justice should be reconceived as one centered on institutional capacity rather than legitimacy. The essential fluidity of processes and institutions is an important reference point. The context of this reconceived approach is a broader view of deliberative democracy, rather than a narrower vision of representative democracy in which the roles of various institutions are seen in "either/or" terms. In escaping this dichotomy, steps can be taken toward developing a more sophisticated view of dialogue between courts, legislatures and other segments of society. This reformulation also creates greater space for the consideration of transformative human rights practices.

B. Recasting the Functional Critique

The existing functional critique is hampered by the overwhelming precedence of a managerial perspective in the problematization of the functioning of the courts and human rights commissions. This limits the potential for reform and can have perverse effects in terms of the quality of the process. For example, the increased focus on speedy settlement of human rights complaints can create undue pressure that result in unfair outcomes. This suggests that countervailing substantive or qualitative concerns need to be woven into this problematique to a greater extent than at present.

Within the courts, an alternative way to reframe the functional critique is to develop a separate discourse on reform of human rights litigation as a specific category of legal cases. At present the extent to which the public nature of these cases is taken into account is fairly limited. One of the results is inconsistency in practices, because rules of procedure are insufficient to deal with the particular challenges of public interest litigation. As a result decisions on issues such as the

¹⁰⁵Shauer, "Legal Positivism and the Contingent Autonomy of Law", at 216.

participation of interveners or forms for the submission of s.1 evidence are made by judges on an ad hoc basis.

The recognition that a single litigation system and related processes is insufficient is an important starting point. It is wrong to assume that the private law model is adequate for rights adjudication. What is required is a truly public system of rights litigation. The fundamental premise must shift from viewing litigation in the simple terms of dispute resolution to a much greater emphasis on the rights vindication function. This entails recognizing and addressing the different requirements of the rights vindication role. This change in focus could result, for example, in the promotion of different procedures, expanded types of group claims, further liberalization of standing and greater access to a variety of court procedures.

The procedures adopted by human rights commissions and tribunals already make room for recognition of the public nature of complaints. However, in practice this dimension is only to exercised to a limited extent. In addition, recent developments have involved integrating private informal dispute resolution mechanisms such as mediation within the complaints process without adequate consideration as to the consequences of these procedures.¹⁰⁶

An alternative problematique will also make the choice of pursuing litigation less of an "either/or" situation than it is currently conceived by many rights advocates. Human rights practices do not operate only within legal institutions. This relates back to the need for a more sophisticated understanding of the interrelationship between courts, commissions, legislatures and other institutions and segments of society.

One priority issue can be teased out of the existing functional critique and recast in more fundamental terms. This is the need to reconsider the imbalance between individual and systemic approaches to the interpretation and application of human rights norms. Much of the dilemma

¹⁰⁶Buckley, *Human Rights Dispute Resolution Options for the 21st Century*. See discussion of this point in the next section and in Chapter 4.

concerning further reform of the practices of human rights commissions arises from this unevenness. The commissions were set up to deal with discrimination which at the time was understood mainly in individual terms with a focus on the need to change individual attitudes. Today our understanding of equality is much more complex, particularly in its greater appreciation of the systemic aspects of discrimination. However, the systems in place in the commissions still for the most part, reflect this initial focus on individual acts of discrimination. There is resistance to a fundamental redistribution in priorities from one level to the other.

Another aspect of this problem is the yet unvoiced need to rethink the relationship between individual and systemic approaches, not simply the priority between the two. This rethinking should also be applied to litigation practices in the courts. There are transformative possibilities in redesigning this relationship that need to be explored.

The transformative framework established at the beginning of this study noted the importance of the transition from an emphasis on retrospective to prospective approach to human rights practices. For the most part, adjudication focuses on providing a remedy once a court or tribunal finds that a violation has occurred. Although this is not wrong, it is not enough. For example, once established, human rights norms can have a prospective effect in other situations. At present there is insufficient institutional support to promote this impact. Legal institutions should be redesigned so that they have the capacity to pay attention to various levels of change and interconnections between them in a proactive way. The consequent improved effectiveness of the communication and reinforcement of judicial and quasi-judicial human rights decisions could ultimately reduce the demands upon these legal institutions and promote human rights practices in other sites.

C. Revisiting the Potential of Informal Processes

It is difficult to reconcile the critiques of adversarialism with that of the use of informal processes in the context of the interpretation and application of human rights. A partial explanation for this

tension can be attributed to the pervasiveness of the adversarial legal form as being almost synonymous with justice with other forms being classified as second class justice. The "ideal-type" of a fair trial casts a long shadow on alternative methods.

In the human rights context three other factors are at work. One contributing factor is an understanding of rights as absolute, that is, all or nothing and therefore requiring a distributive resolution process which creates winners and losers. A second factor involves concerns about the degree of change required to fulfill human rights norms as being beyond what can be achieved through negotiation. Thirdly, part of rights consciousness is the belief in due process and formal rules. This has narrowly circumscribed consideration of the potential of non-adversarial approaches in the social practice of human rights. The perception is that "We are dealing with citizen's rights in the public sphere not customers and interests in the private sphere, informal processes do not seem to have much to say."¹⁰⁷ The narrow view is exacerbated by the relatively small range of informal dispute resolution options that are contemplated within these analyses.

This limited view of the potential of alternative processes may not be in step with the preferences of individuals who seek to have their rights vindicated. Consultations pertaining to reform of the Ontario Human Rights Commission processes revealed that a number of claimants wanted to be able to tell a respondent what it felt like to be discriminated against. They asked for a non-adversarial process which was respectful and fair. They were offended by the present settlement process, where they have no control and feel they are being "bought off".¹⁰⁸ This perspective echoes the results of other public surveys of civil justice system users in which preferences for more informal procedures have been highly ranked.¹⁰⁹ In comparison with formal court procedures, studies have shown that mediation can be personally more satisfying for traditionally disempowered groups.¹¹⁰

¹⁰⁷Schoeny and Warfield, "Reconnecting Systems Maintenance with Social Justice", at 260.

¹⁰⁸*Cornish Report*, at 24 and 116.

¹⁰⁹For example, see Melina Buckley, *Perspectives on the Civil Justice System*, a background study prepared for the Canadian Bar Association Systems of Civil Justice Task Force (Ottawa: Canadian Bar Association, 1997). This report contains an analysis of a national survey of members of the public on dispute resolution options carried out in 1996.

¹¹⁰Margaret Thornton, "Equivocation of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *The Modern Law Review* 733, at 759. Although there is contradictory evidence on the ways in which

These contradictions suggest that it is time to revisit the potential of informal resolution processes within human rights practices. The first step is to take a second look at the original vision of human rights commissions processes. However, this cannot be done in a simplistic way given our enhanced understanding of the structural nature of human rights violations.

At the inception of human rights commissions, emphasis was placed on the objective of changing attitudes through the complaints process. Today this function is served by more general public education efforts. Yet, individual and organizational capacity for change in perspective is much greater when confronted by the need to reconcile a specific situation with human rights norms than when presented with this information in the abstract without a focused context for its application.¹¹¹

The relational context of human rights disputes was also given higher priority in this founding vision. The contending parties were to be brought together "not as adversaries but as interrelated actors who need to understand one another and to learn to live together in accordance with human rights principles."¹¹²

This primary emphasis on education and transformation has been replaced by a primacy on remedy. Despite the avowed objective to refrain from a punishment model, awards are often seen as punitive by the responding party. Where the remedy is limited to a monetary award it does not advance human rights norms or social justice in a substantive way, nor is it necessarily a satisfactory response for the individual who has experienced discrimination. The resurgence of adversarial approaches has had a tendency to further limit the search for more creative solutions, even in the context of commission-mediated settlements. All of these factors suggest that a review of the potential of a broader range of processes for dealing with human rights complaints is warranted.

mediation can further the disadvantage experienced by minorities as much depends in the structure of the process and the effectiveness of procedural safeguards to address these concerns.

¹¹¹Young, *Inclusion and the Other*.

¹¹²Tarnopolsky, "The Iron Hand in the Velvet Glove".

Most critiques of mediation focus on a microanalytic level, they give short shrift to the broader implications of mediation as a vehicle for policy-making.¹¹³ Under the current problematique, informal resolution processes are seen as antithetical to the pursuit of systemic claims and systemic remedies. This premise cannot be substantiated. Informal processes have a greater potential role to play in addressing systemic discrimination than is currently understood. For example, general human rights norms could be applied in a large workplace or sector through a mediated process with broad and representative participation.

Structural inequalities create complex conflicts that are frequently characterized by multiple systems imbedded in organizations and institutions and by competing rules, roles and responsibilities. In these circumstances, facilitated negotiations can lead to more effective implementation of rights and just outcomes.¹¹⁴ The collaboration of all the parties involved serves to ensure that solutions are workable. In addition, negotiated solutions can be more easily implemented and enforced. Properly constructed consensual practices will not unravel safeguarding legal precedents, in fact these practices can strengthen them.¹¹⁵

Some proponents of informal resolution processes point to the absolute need to have disempowered parties involved in the definition and enforcement of rights through informal methods as a requirement of achieving substantive equality. These authors emphasize the way the potential of multilateral negotiation frameworks that directly address power imbalance¹¹⁶ and the transformative potential of community-based mediation.¹¹⁷

Opening the door to employing informal resolution methods to address systemic discrimination and structural inequalities brings us back to the requirement of enhancing the public nature of the

¹¹³Dukes, *Resolving Public Conflict*, at 99.

¹¹⁴Schoeny and Warfield, "Reconnecting Systems Maintenance with Social Justice", at 260.

¹¹⁵*Id.*, at 258.

¹¹⁶L.Behrendt, *Aboriginal Dispute Resolution* (Australia: The Federation Press, 1995).

¹¹⁷E.Schwerin, *Mediation, Citizen Empowerment and Transformational Politics* (New York: Praeger Publishing, 1995).

complaints process. All equality claims have a public interest component as well as important personal consequences for those directly involved. These competing public/private purposes exist within the terms of human rights legislation, regardless of the structure of the complaints process. The very focus on individual, isolated, anti-social instances of discrimination has been criticized for implicitly accepting the institutional status quo.¹¹⁸ These competing purposes are brought into high relief when alternative means of dealing with complaints are considered. However, informal methods of dispute resolution magnify but do not cause these concerns. Given the essentially public nature of human rights, informal resolution processes should be designed to serve the public interest in achieving equality as well as resolve the disputes between private parties.

There is an intimate relationship between the way individual disputes are resolved and the overarching patterns of interaction within society. The focus is not solely on ends but on means to get there. Each human rights case or complaint is an opportunity to build social justice through individual outcomes that can be amplified through a properly structured process.

The current problematique is founded on a fairly narrow range of informal models. Most of these have developed in the context of private dispute resolution. These models are further circumscribed by the fact that they are integrated into a fundamentally adversarial system.¹¹⁹ Revisiting the potential of informal resolution processes involves consideration of a broader range of alternative processes and developing models that are tailored to human rights practices. At present, legal processes seldom achieve a true resolution of interests much less transformative change. The goal is to change this dynamic.

¹¹⁸This argument has been made most strongly with respect to the Australian system. See for example Thornton, "Equivocation of Conciliation", at 745-752.

¹¹⁹Even though commission processes are not structured in an adversarial manner, adversarialism creeps in through expectations of the parties and even more so by their legal representatives. This impact is exacerbated by the fact that an adversarial tribunal hearing is the possible culminating point of the resolution process.

D. Legal Institutions and Social Justice

The current conception of the role of the courts is not focused on achieving social justice as the greatest emphasis is placed on dispute resolution that contributes to social stability rather than change. While human rights commissions were established with equality goals in mind, their role in achieving social justice has been reduced through limited societal consensus on this vision and by practical problems in fulfilling this mandate.

The potential role of legal institutions is further circumscribed by current critiques of human rights practices within these institutions. When these criticisms are drawn together they form a problematique that is conceived in excessively narrow terms. As a result, the problematique works toward maintaining the status quo by limiting the terms of reform to levels that do not challenge current practices in a serious way.

This problematique needs to be recast in much broader terms because it has inhibited a meaningful discussion on the potential capacities of the courts and human rights commissions. In addition, it leaves no room for consideration of the role of other segments of society and fora as sites for human rights practices. A whole series of interesting questions of institutional design are kept out of the conversation on the role of legal institutions in achieving social justice. In reality, the potential capacity is open-ended. Institutions can be designed in an infinite variety, as long changes are supported by sufficient social consensus and consistent cultural practices.

The critical analytical framework established in this thesis requires a comparison between current human rights practices and a normative conception of the transformative ideal. This comparison creates a critical space in which change can be imagined. The dialectic between existing and potential practices contributes to learning and change.

Transformative human rights practices are ones that consciously make social justice, rather than dispute resolution, their primary aim. Equality is a guiding principle on both a procedural and a substantive level, to social justice. As seen in the last chapter, the promotion of transformative human rights practices is limited foremost by the prevailing narrow view of human rights. These conceptions do not sufficiently acknowledge the dual nature of rights as simultaneously a social practice and a body of doctrine. Human rights are a set of social practices, of which the legal interpretation and application of rights is only one of many facets. Human rights norms provide the framework within which these social practices operate toward the further interpretation and application of norms in concrete, relational settings.

Legal institutions currently approach human rights issues as disputes which are to be considered, determined and remedied retrospectively. Transformative human rights practices encompass this approach but place a higher priority on dealing with these issues prospectively, by fostering learning and ongoing change.

The transformative perspective highlights two major roles for legal institutions in achieving social justice. The first is the promulgation of the background human rights norms that shape human rights practices in other settings, both private and governmental. The second is the provision of procedures that contribute, both directly and indirectly, to transformative human rights practices. It is through these two roles that legal institutions contribute to the development and application of shared, reflectively-held human rights norms. This general reframing of the roles of legal institutions suggests the need to further explore two specific avenues for reform.

The first avenue is to explore the role of legal institutions in promoting a broader human rights discourse. This exploration will focus on the role of the courts in promulgating human rights norms. It highlights the public nature of the litigation of human rights issues and the requirement to incorporate human rights norms into legal, social, economic, administrative and personal actions. One of the central issues becomes the way in which courts interact with political institutions and other sites of human rights practices. These interactions between institutions and segments of

society are reviewed in terms of their contribution to a dialogue or discourse on human rights. This discourse is seen as taking place within the normative construct of the public sphere, that is the space in which non-state actors interact with each other and with state actors.

The second avenue relates to the procedures employed by legal institutions and the extent to which they contribute to transformative human rights practices. The focus here is on the human rights commissions and the integration of a transformative public conflict resolution model. This model facilitates the shift from an emphasis on settlements through remedies to seeing the process in educational and change-oriented terms leading to resolution.

The reframing of the role of legal institutions is introduced in greater detail in the next two sections. This is the first step in progress toward answering the second thesis question of what types of institutional changes should be considered to enhance the role of legal institutions in achieving social justice.

(i) Promoting a broader human rights discourse

The proposed reconceptualization places greater emphasis on the rights vindication function of Canadian legal institutions. This shifts the emphasis away from the primacy of thinking in dispute resolution terms. Human rights practices cannot be seen solely in terms of settling disputes and remedying wrongs. Rather, these norms provide an expansive vision for shaping society through deliberation. Human rights norms are a supportive source for conceptualizing and enacting reforms. They not only have a role in resolving disputes but more importantly they provide methods of deliberation and accommodation. They offer the potential to create equality and social justice through a multitude of interactions.

Human rights practices are fundamentally about applying basic norms in particular circumstances. Abstract pronouncements on the existence or meaning of a human rights norm do not in themselves lead to transformation. These changes occur when the meaning of these norms are accepted and

integrated in society. This process takes place in specific situations and contexts. One model of human rights practice is through the enforcement of a remedy ordered by a legal institution. However, the potential for transformation is enhanced where human rights norms are applied in a collaborative way through deliberation in a specific setting. Even where there is a court-ordered remedy, it often requires further deliberation and agreement among all parties to fully implement it.

This more expansive function is conceived in terms of the role of legal institutions in promoting a broader human rights discourse. A framework for this reconceptualization can be derived from sociological and political theories of deliberative democracy and linguistic approaches to discourse and social change and particularly the normative construct of the public sphere. This framework and its implications for reform of Canadian legal institutions is outlined in Chapter 3.

This reconceptualization creates a new focus. Rather than seeing the role of legal institutions as mainly a question of the impact of specific decisions or the treatment of specific issues, the focus becomes the more diffuse but critical role of their contribution to human rights discourse. Within this transformative framework, the main role of legal institutions is to promote the development of shared, reflectively-held human rights norms.

Underlying this approach is the idea that interpreting and applying human rights is a shared responsibility. This leads to questions of institutional means to facilitate these deliberative practices. It requires us to develop a more nuanced and sophisticated appreciation of the current and potential dialogue between the courts and legislatures and broadens the focus to other sites of human rights practices. It suggests ways in which all of these sites of human rights practices can be woven together in order to foster social transformation.

Support for this new conception of the role of courts is emerging in the literature on the legitimacy of constitutional review. In particular, the "dialogue metaphor" has been introduced as a way of understanding the relationship between the courts and legislatures that avoids the dichotomous terms

of the current debate.¹²⁰ The traditional focus of this debate has been on who should get the final word, the courts or the legislatures. Dialogic theories emphasize the exchange between these institutions as they seek out the best interpretation and application of human rights norms.

For example, Hogg and Bushell have proposed a theory of judicial review as constituting dialogue that contributes to government by discussion.¹²¹ This can be directly contrasted with the views of Charter adjudication as coercive and undermining public and political debate. This approach holds that a government unhappy with the judicial nullification of one of its policies has the means to reverse it either by enacting revised legislation or, more emphatically by re-instating the whole law through the use of the legislative override provision in s.33.¹²² Even scholars who share many of the concerns about the "judicialization of politics" set out above, see section 33 of the Charter as the foundation of an inter-institutional dialogue, in which courts and legislatures issue reasoned responses to each other's initiatives, thereby improving the quality of both public deliberation and its policy outcomes.¹²³

This dialogue theory has been further refined and developed by Kent Roach.¹²⁴ He argues that the Supreme Court's relationship with legislatures under the Charter is not fundamentally different from its relation with the legislature when it develops the common law and interprets statutes in light of the presumptions enshrined in the common law constitution. He describes this relationship in these terms:

¹²⁰In this section, the term "dialogue" is employed in the manner developed by Canadian legal scholars to describe the inter-institutional conversation between the courts and the legislatures. A more normative conception of dialogue as entailing an open-ended interpretive collaboration will be used in later sections of this thesis.

¹²¹Peter Hogg and Allison Bushell, "The Charter Dialogue between courts and legislatures" (1997) 35 *Osgoode Hall Law Journal* 75.

¹²²Section 33 is a Charter provision which permits governments to adopt laws notwithstanding the fact that they are a breach of a Charter right. Section 33 applies only to sections 2 (fundamental freedoms); 7-14 (legal rights) and section 15 (equality rights) of the Charter.

¹²³Peter Russell, "On Standing Up for Notwithstanding" in *Contemporary Political Issues* eds. Mark Charlton and Paul Barker (Scarborough, ON: Nelson, 1991) 73-85, at 74

¹²⁴Roach, "Constitutional and Common Law Dialogues".

In all cases, the Court initiates a dialogue that calls the attention of legislatures to the rights, procedures and values that the Court has articulated and defended. The common law and Charter values proclaimed by the Court then enjoy the burden of legislative inertia. In almost all cases, however, the legislature can respond to the Court's ruling by articulating clear departures from and limitations on the starting point set by the Court's rulings.¹²⁵

The structure of the Charter, and particularly sections 1 and 33, promotes a continuing dialogue that is similar but not identical to that achieved under common law. Analysis under s.1 provides legislatures with the opportunity to provide its views on why certain limitations on rights are justifiable in the overall context of a free and democratic society.

The Supreme Court of Canada has endorsed a dialogue theory on rights in several of its judgments. For example, In *Vriend*, the majority held:

The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overriding laws under section 33 of the Charter). This dialogue between, and accountability of, each of the branches have the effect of enhancing the democratic process, not denying it.¹²⁶

Similar comments were made by the Court in the context of common law developments in the *Mills* case.¹²⁷ This dialogue is enhanced by the Court adopting "a posture of respect" and leaving room for the legislature to respond to its decisions without the use of the override provision.¹²⁸ In particular, the Court noted that more deference was due where the legislature had found its previous decision unacceptable and taken steps to reconcile the underlying principles in a new statute or policy.

¹²⁵*Id.*, at 482.

¹²⁶[1998] 1 S.C.R. 493, at para. 139.

¹²⁷(1999), 139 C.C.C. (3d) 321 at paras. 56-58. Here the Court stated: "if the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy."

¹²⁸Roach, at 502.

This dialogue between courts and legislatures is seen as enhancing democracy because it continues debate about difficult decisions. However, critics of the dialogue approach argue that it remains more of a monologue because judicial rulings decisively change the government's options.¹²⁹ The introduction and development of the dialogue metaphor offers a glimpse of a nascent theoretical framework for a new understanding of the role of legal institutions in achieving social change. This is however only a partial reconception of the role of the courts within democracy as the notion of dialogue is evoked at a fairly superficial level.

In addition to further exploring the dialogue metaphor as it applies to the relationship between legal and political institutions, the idea of shared responsibility needs to be expanded further. Part of this question revolves around the specific roles of legal institutions in dialogue on human rights. However, a broader conception of the "dialogue" within society is also required. This involves acknowledging other sites of human rights practices and conceptualizing their role vis-a-vis formal legal institutions. For example, the conceptions presented above do not say much about segments of society, their voices and how they interact with state institutions in the context of human rights practices. The term "discourse" rather than "dialogue" is employed to capture all of these discussions and the relationship between individual human rights dialogues that go on over an extended period of time. The idea of a broader human rights discourse is developed in explored in Chapter 3.

(ii) Integrating transformative mediation practices

Transformative human rights practices require the development of non-adversarial approaches. Advancements on this front will not be made by accepting the limited ways in which "ADR" has currently been integrated into the legal system. While there is the illusion of choice of many models, a veritable plethora of dispute resolution processes, they all operate within the existing framework with the same assumptions, values and norms. Despite the hype, for the most part experience with the problem-solving approach to mediation within the legal system has not resulted in truly

¹²⁹Morton and Knopff, *The Charter Revolution*, at 162. See also Manfredi and Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 *Osgoode Hall Law Journal* 520.

collaborative approaches to conflict.¹³⁰ Part of the problem is that these processes are integrated into an adversarial process and are intertwined with dominant cultural practices and implicit cultural knowledge. As a result they are more likely to reproduce social injustice rather than counteract it.¹³¹

Transformative human rights practices should encompass true alternatives to existing processes. These options aim to resolve rather than merely settle contradictory claims over the meaning and application of rights norms. They will have to be based on other conceptions of conflict, alternatives to power in shaping outcomes, and provide greater opportunities for group-based processes. Here, the fundamental shift is from dispute resolution to conflict resolution. The differences between resolving a "dispute" and a "conflict" relate to the extent to which the underlying causes of conflict are addressed and in some cases, transformed.¹³²

The legal system tends to define conflict as disputes in order to limit them. This has an important systems maintenance function. However, this approach is insufficient where the goal is social transformation rather than maintenance of the status quo. While dispute resolution in its traditional and "alternative" guises may be acceptable approaches to addressing conflicts within an acceptable status quo, it is not appropriate for human rights practices aimed at achieving social justice.

Distinctions must be made between interventions geared to changing the sources of conflict such as dysfunctional relationships and unequal social structures and those that emphasize settlement or conclusion. The former entail conflict resolution, while the latter can best be seen as dispute resolution.¹³³ The struggle for justice through the interpretation and application of human rights norms is an example of public conflict that is not meant to be managed by a dispute resolution

¹³⁰For example, see: Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR' (1991) 19 *Florida State University Law Review* 1; R.H. Mnookin, S.R. Peppet, and A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2000).

¹³¹John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass Publishers, 2000) at 100.

¹³²A fuller discussion of the definitions of between dispute resolution, conflict resolution and conflict transformation and their impact on process is made in section 4.2.C "Reconsidering Models of Mediation".

¹³³Schoney and Warfield, at 259.

process. These issues are about addressing deep-rooted problems of injustice found in societies where there are great inequalities of power and resources, and the need to be aware of how those inequalities play out along racial, ethnic, ability, class, and gender lines.

Recent innovations in dispute resolution research also emphasize this shift in focus from settlement to resolution. This is based in part on the disappointing results with many "ADR" projects and on a more realistic assessment rather than an idealized version of adversarial litigation.¹³⁴

The most promising developments are in multidisciplinary approaches centering on theories of conflict transformation, models of public conflict resolution and related concepts and practices, including transformative mediation. I refer to this field as a whole as transformative public conflict resolution. These approaches are based on the view that resolution processes works by altering the initial conflicting perspectives or definitions of interest and transmutes them into a jointly-held view of the problems leading to jointly-determined outcomes. These forms of mediation are in effect learning processes. They prioritize the educational and fundamental change aspect of conflict resolution in a manner akin to the original vision of human rights complaints processes.

This transformative public conflict resolution approach has an enhanced ability to deal with many of the concerns about non-adjudicative processes discussed above. These include: paying greater attention to qualitative issues and the public interest, redressing the balance between individual and systemic approaches, emphasizing fairness in both process and outcome and contributing to the development of human rights norms.

Models of transformative public conflict resolution and related mediation practices enlarge our thinking and push the boundaries of current conceptions about informal resolution processes.

¹³⁴Carrie Menkel-Meadow, "When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals" (1997) 44 *UCLA Law Review* 1871. On disappointing results with ADR projects see, for example, J. Kakalik et al, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND: 1996). Although evaluations carried out in the Canadian context have been more sanguine about the potential of court-connected mediation, See Julie MacFarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (November, 1995).

However, none of the approaches developed to date go far enough: either they are theoretical and stop short of providing practical advice¹³⁵ or they are practices that have worked in a relatively limited number of settings to date.¹³⁶ In addition, insufficient attention has been paid to the systemic application of the transformative mediation model. The potential value of this approach and issues related to the integration of transformative conflict resolution within human rights practices are explored in Chapter 4.

The alternatives provided by the normative models of discourse, the public sphere and transformative public resolution, allow us to enlarge our conceptions of the role of legal institutions in achieving social justice. This reconception incorporates the idea of law as a social learning process. Broader discourse on human rights norms fosters more opportunities to synthesize the contradictions between human rights norms and the factual experience of members of society. Transformative conflict resolution processes lead to this same type of reconciliation between facts and norms. Social transformation requires learning at both the individual and institutional levels. Human rights norms and legal institutions have an important role to play in these learning processes.

The discussion on promoting a broader human rights discourse concentrates on the role of the courts, while the one on promoting transformative mediation practices is primarily concerned with the process of resolving human rights complaints. However implications are drawn from these two discussions and applied to a variety of sites for human rights practices in the final three chapters. In addition, the two discussions are connected by the overarching theme of the need to reconsider the imbalance between individual and systemic approaches to the interpretation and application of human rights norms. Both reflect on the requirement to redesign legal institutions so that they have the capacity to pay attention to various levels of change and interconnections between them in a proactive way.

¹³⁵For example, Dukes, *Resolving Public Conflict*, provides an excellent overview of what could and should be achieved through public conflict resolution processes but provides only very general guidance in terms of practice.

¹³⁶For example, the narrative mediation model developed by Winslade and Monk, which I set out and build upon in Chapter 4.

CHAPTER 3

PROMOTING A BROADER HUMAN RIGHTS DISCOURSE

3.1 Overview

This chapter elaborates the first element of the transformative ideal which relates to the role of legal institutions as promoting a broader human rights discourse. The adjective broader is selected because it denotes a number of qualities that are currently restricted and require enhancement. Human rights discourse should be broadened in the sense of becoming more extensive, inclusive, comprehensive, explicit, and progressive (in the sense of being broad- or open-minded). The term 'broad' also refers to the need for a greater number of sites for human rights practices and increased dialogue and interaction between these sites.

The potential for a broader human rights discourse can be assessed within the construct of the public sphere. The first section draws on social, political and linguistic theories to establish a normative account of the public sphere. In particular, this account is informed by the work of Jurgen Habermas, Iris Marion Young and other proponents of alternative conceptions of democracy, variously referred to as deliberative, communicative, discursive, deep and strong democracy.¹ This also involves an exploration of the nature and qualities of discourse and the role of basic rights norms within deliberative practices in the public sphere.

In the next section, the concept of public sphere is further refined as it relates to the promotion of human rights practices. Deliberative practices require not simply more participation but also a greater

¹I adopt Young's term of communicative democracy which is broader and more inclusive of other forms of communication than theory of deliberative democracy developed by Habermas and others, and a richer concept than strong or deep democracy.

capacity for reflection and reflexivity on the part of individuals and institutions. Legal institutions have an important role in promoting these qualities thereby assisting in the re-creation of a public sphere in which transformative human rights practices can flourish.

This normative account of the public sphere emphasizes the importance of consciously constructing the role of public discourse in democracy. It paves the way for an elaboration of the reconceived role of legal institutions as facilitating a broader human rights discourse. This is explored in terms of the role of courts and other institutions in promoting deliberation, and the dialogue between and among legal institutions, political institutions and other sites of human rights discourse and practices.

The dialogue between courts and legislatures can be seen as a form of artificial deliberative community.² One priority is to make this dialogue more effective. In addition, a more natural form of deliberative community is required in the public sphere in order to foster broader and more extensive transformative human rights practices. In order to effect social transformation, rights need to be taken to heart by the people. This involves moving human rights "from the margin to the mainstream,"³ by integrating deliberation about their interpretation and application into a multiplicity of participatory, reflexive and critically reflective structures and processes.

This emphasis on the public sphere may appear misplaced given the sorry state of contemporary public discourse. At present, the most common fora for public discussion of social problems and controversial issues rarely lend themselves to developing understanding and solving problems. Many of the most accessible public fora are symbolized by the invective of radio talk shows and other media which are "generally sensational, shallow, adversarial, personal, and entirely unproductive of understanding."⁴

²Habermas, *Between Facts and Norms*.

³P. Maggean and M. O'Brien, "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) 22 *Fordham International Law J.* 1389.

⁴Dukes, *Resolving Public Conflict*, at 63.

review of many public fora where the state and members of society interact suggests that these more formal deliberations are no better. The procedures utilized are often confrontational, inflexible and usually intimidating for non-professional participants. The sterile and fundamentally non-reciprocal nature of these discussions can be summed up in this manner:

Consider a typical public hearing. Speakers stand with their backs to the audience. They face an array of microphones on an unfamiliar podium. Speaking time is restricted and carefully monitored. The authorities hearing comments, seated behind their own desks and their own microphones, look down on the speaker from an elevated stage. Little or no response by these authorities is offered to the comments. If there is any negative response by following speakers, there is no further opportunity for rebuttal, much less engagement in dialogue.⁵

In addition, many members of the public harbour often well-founded suspicions that the entire process is not a genuine one. There is a great deal of skepticism that participation in these public consultations will be meaningful. For many women's equality rights advocates this mistrust has been reinforced by recent negative experiences with several federal governmental and Parliamentary consultations.⁶

This dire assessment does not lead to the conclusion that it is impossible to have effective public dialogue. Rather, it underscores the imperative of transforming these cultural practices and institutions. Theories of communicative democracy and discourse provide a starting point for exploring the shape of this transformation. Models of participatory and reflective deliberative practices are already being applied and can be glimpsed, for example, in some voluntary associations

⁵*Ibid.*

⁶Especially the experience of the Joint Committee on Custody and Access and the cancellation of the annual consultation on violence against women hosted by Justice Canada. See Carole Curtis, "The Tortured Path to Law Reform of Custody and Access Law in Canada: Do Women's Experiences Matter?" (paper presented at national forum *Transforming Women's Future*, 1999).

outside the state.⁷ Together these theories and nascent practices provide a foundation to guide the consideration of how legal institutions can promote a broader discourse and enhance transformative human rights practices.

3.2 A Normative Conception of the Public Sphere

A. The Public Sphere

(i) The Public Sphere and Communicative Democracy

Contemporary society can be envisioned as comprising three interacting elements: the state, the economy and civil society. In addition, there is a conceptual space in which members of civil society communicate with each other and with state agents. This space is conceived of as the public sphere.⁸ This conceptualization provides a more sophisticated and dynamic understanding of society and the way it operates by comparison with traditional socio-political approaches. It moves away from a unitary approach to "society" or a static focus on state and non-state actors. This approach provides a more inclusive framework within which to analyze the interactions between segments of society in general and more specifically with a view to social transformation. It also highlights the notion of agency within change processes rather than a more materialist structural view, thereby creating more analytical space for integrating transformative human rights practices. The notion of the public

⁷I.M. Young, "Communication and the Other: Beyond Deliberative Democracy," in her collection of essays, *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy* (Princeton University Press, 1997), at 61.

⁸Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, tr. Thomas Burger with the assistance of Frederick Lawrence (Cambridge, Mass: The MIT Press, 1992 [originally published in German in 1962]). Habermas' approach to the public sphere has been substantially revised over the years as is apparent in *Between Facts and Norms* and his essays in *The Inclusion of Other: Studies in Political Theory* trans. and ed. Cianan Cronin and Pablo De Greiff (Cambridge, Mass, 1998). For a discussion and critique of Habermas' conception of the public sphere and comparison with other approaches, see *Habermas and the Public Sphere* and Jean L.Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Mass: The MIT Press, 1992). However, these works for the most part rely on Habermas's early conception of the public sphere.

sphere enriches a discussion of the role of the courts by providing a more textured context within which legal institutions can be seen to operate.

While the terms state and economy are self-explanatory, the term civil society can be defined in different ways.⁹ In most general terms, civil society is described a vast range of "uncoerced" human associational processes and activities.¹⁰ It is an expansive term that can be applied to all voluntary associational life that is distinct from state and economy. Young has developed a particularly robust view of civil society which is relied upon in this study.¹¹

One important role of civil society is the self-organization of marginalized people into affinity groupings enabling people to develop a language and voice.¹² A second function is that of civic activity autonomous from the state that provides a basis for social innovation and the provision of goods and services less dominated by profit imperatives than conventional private enterprises.¹³

Civil society can be seen as comprising at least three different types of associative activity: private, civic and political.¹⁴ Private association involves activities for the benefit of the participants or members of the association, including families. Civic association is primarily directed outward from association members to others. Here the aim is to serve not only members but also the wider community and to make a contribution to collective life at some level, be it the neighbourhood, city, country, and/or world. Political association involves a self-conscious focus on claims about what the

⁹See discussions in Cohen and Arato, *Civil Society and Political Theory*, Nerrra Chandhoke, *State and Civil Society* (Berkeley, CA: Sage Publications, 1992); Keith Tester, *Civil Society* (London: Routledge, 1992); Michael Walzer, ed., *Toward a Global Civil Society* (Providence, RI: Berhahan Books, 1995).

¹⁰Michael Walzer, "The Idea of Civil Society," in *Toward a Global Civil Society*, at 7.

¹¹This entire section is based on Young, *Inclusion and Democracy*, at 154-88.

¹²*Id.*, at 168-9.

¹³*Ibid.*

¹⁴*Id.*, at 160-4.

social collective ought to do. Political activity is "any activity whose aim is to politicize social or economic life, to raise questions about how society should be organized and what actions should be taken to address problems or do justice".¹⁵

Young has refined this conceptualization of civil society by suggesting that the three sectors should not be seen in spatial terms but rather through a process-oriented understanding.¹⁶ She argues that rather than state, economy and civil society as distinct spheres or clusters of institutions, we should think of them as kinds of activities:

State designates activities of formal and legal regulation backed by legitimate coercive apparatus of enforcement. Economy designates market-oriented activity concerned with the production and distribution of resources, products, income and wealth, which is constrained by considerations of profit and loss, cost-minimization and so on. Civil society names activity of self-organization for particular purposes of enhancing intrinsic social values.¹⁷

This process understanding is to be preferred because it takes into account the fact that some institutions include all three kinds of activities.

Civil society has both an internal and external function. The internal function refers to the self-organization aspect of civil society: "the ways associations and social movements support identities, expand participatory possibilities and create networks of solidarity."¹⁸ The external or public exposure function aims to influence or reform state or corporate policies and practices. It is these latter forms of activity that create the public sphere.

Civil society enables the emergence of a public sphere in which differentiated social sectors express their experience, formulate their opinions, and influence state and economic power. The public

¹⁵*Id.*, at 163.

¹⁶at 160.

¹⁷*Ibid.*

¹⁸*Id.*, at 163-4. Her approach is similar to Cohen and Arato's dualistic theory of civil society with "defensive" (internal) and "offensive" (external) aspects.

sphere is a space in which problems of the whole society are discussed, processed and influence the formation of law and public policy.¹⁹ The public sphere can best be described as a network for communicating information through which the streams of communication are "filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions."²⁰

Among proponents of this socio-political conceptual approach, there is a consensus that civil society is formed by many associations and types of activity. However, there is disagreement as to whether the public sphere should be seen as a "single continuous area of discourse and expression"²¹ or as constituted by diverse public spheres.²² Young is persuasive in her argument supporting the unitary conception as essential if the idea of public sphere "is to be helpful in describing how a diverse, complex, mass society can address social actions through public action."²³ This is the only workable definition if the public sphere is to be meaningful as a space in which multiple actors from the three sectors are to be able to communicate with and influence one another. Otherwise, there is insufficient distinction between the public sphere and civil society.²⁴

¹⁹The reference to "public" is distinct from current usage which tends to equate public with state or government activities or fora. In contrast, public here is a sphere which is free from domination by either state or economy, although state and economy can take part in deliberations within this sphere. See Habermas, *The Structural Transformation of the Public Sphere*, diagram at 30 and discussions throughout this work.

²⁰Habermas, *Between Facts and Norms*, at 360.

²¹This is the position taken by both Habermas and Young. However, Habermas is a bit unclear to read on this point because he sometimes refer to "public spheres" in the plural. I read him to mean different ways in which the public sphere functions, for example he refers to the "public sphere in the political realm" and the "public sphere in the world of letters". He clarifies this in *Between Facts and Norms* at 304-7. Young's discussion is very clear on this point, as noted in this quote, in *Inclusion and Democracy* at 170.

²²For an example of the latter view, see Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in Bruce Robbins (ed.) *The Phantom Public Sphere* (Minneapolis: University of Minnesota Press, 1993), 14.

²³Young, *Inclusion and Democracy*, at 171.

²⁴This is a problem in many accounts in which the term civil society is used to mean both the types of associational activity described above and the interaction between associations and with state entities.

Those who would prefer to see the public sphere as a series of publics and counter publics are worried about the operation of privilege and the potential toward discursive hegemony.²⁵ Concerns about structural inequalities and power differentials are important but can be directly addressed in the construction of the public sphere. The conception of the public sphere is a normative one and is dependent on the existence of specific qualities that counteract inequalities and attempts to control or limit discourse. Deliberations within the public sphere are shaped by conditions for discourse and by rights norms.²⁶ The public sphere can best be seen as a single contested, participatory space in which:

actors, in their overlapping identities as legal subjects, national citizens, economic actors, and family and community members, engage as a public body in negotiations and contestations over public matters and national law.²⁷

While there is only one public sphere, it cannot be seen as single decision-making point. In order to clarify this distinction, I employ the idea of alternate sites of discourse within a single public sphere which constitutes a single public body. Further interaction and deliberations occur between sites within this social space. The public sphere can be seen as a single network of deliberations thereby emphasizing the permeability of different discourses within society. The relationships between these discourses is the whole point of the conception of the public sphere as a place in which distinct interests are transformed into more generally held ones. It is by incorporating difference in a single inclusive sphere that transformative change becomes possible. Without this coalescent effect the idea of the public sphere loses its meaning.

The normative conception of the public sphere hinges on an enlarged definition of democracy. The most common image of democracy is a centered one in which democratic processes are conceived as one big meeting at the conclusion of which decisions are made. This model envisions an

²⁵Fraser, "Rethinking the Public Sphere", and *Unruly Practices*.

²⁶These qualities are discussed in the next two sections.

²⁷Somers, "Rights, Relationality, and Membership", at 73.

aggregation of interests which compete for influence. This competition is settled by elected representative on the basis of formal conditions, most often by majority rule.²⁸

Communicative democracy encompasses a model of democratic decision-making which is much more diffuse. Here, democracy is described in these terms:

Participants in the democratic process offer proposals for how best to solve problems or meet legitimate needs, and so on, and they present the arguments through which they aim to persuade others to accept their proposals...Through dialogue others test and challenge these proposals and arguments. Because they have not stood up to dialogic examination, the deliberative public rejects or refines some proposals. Participants arrive at a decision not by determining what preferences have greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons.²⁹

This communicative model does not rely on face to face discussion as the only form of democratic decision-making. It incorporates a "decentered" conception of politics and society in which democracy is not identified with one institution or one set of institutions.³⁰ Rather, it flows and exchanges among various social sectors which are not brought together under a unifying principle. The image of this "decentered" view and the contrast it provides to mainstream conceptions is striking:

²⁸This model is called the "aggregative model" by Young and is also commonly referred to as pluralist or interest group pluralist models of democracy. For summaries and critiques of this model see: Jane Mansbridge, *Beyond Adversary Democracy* (New York: Basic Books, 1980); C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977); Thomas Christiano, *The Rule of the Many* (Boulder, CO: Westview Press, 1996); David Inram, *Reason, History and Politics* (Albany: State University Press of New York, 1995), ch.1; A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Governments in 21 Countries* (New Haven: Yale University Press, 1984).

²⁹Young, *Inclusion and Democracy*, at 22-3.

³⁰Young, at 44-46. She explains that the centered image of deliberative democracy is "bewitched with the image of small group face to face discussion" and thinking about democracy as one big meeting at the conclusion of which decisions are made. Habermas' image of "decentered" society is bigger than politics and thus democratic politics takes place in the context of many complex and related social processes. Decentered does not mean "decentralized" in the sense of dispersal of authority among smaller jurisdictions. A decentralized democracy can also be centered if the focus is still on a single fora for political discussions.

The norm guided communicative process of open and public democracy occurs across wide distances and over long times, with diverse social sectors speaking to one another across differences of perspective as well as space and time.³¹

This model involves abandoning the focus on face-to-face interaction and unified and orderly public discussion and replacing it with a many-levelled, messy and dramatically more open view of public debate.³² In order to function, the public sphere depends upon the creation of many spaces for these discussions. It denotes a particular kind of relationship developed within reflectively-created and universally accessible sites, fora, and events in which expressions are exposed to a plurality of points of view.

(ii) Role and functions of the public sphere

The associational activity within civil society contributes to the identification of societal problems, interests, and needs. Within the public sphere, these problems are taken up, communicated to others, given urgency and pressure is put on state institutions to implement measures to address them.³³

To some extent, the public sphere operates to "change society through society" without directly targeting the state or economy.³⁴ Change can occur through the development of new norms and different ways of living and associating. These become more widespread through the public sphere which facilitates the diffusion of these novel ideas, practices and alternatives. For example, the feminist critique of the sexual division of labour has generated decades of public discussion on the

³¹*Id.*, at 46.

³²This model would extend, for example, to politicized art and culture and multiple forms of protest action. See, Jean Cohen and Andrew Arato, *Civil Society and Political Theory: Democracy in Capitalist Times* (Oxford: Oxford University Press, 1996) and Andrew Szasz, "Progress through Mischief: The Social Movement Alternative to Secondary Association" in E.O.Wright, ed., *Associations and Democracy* (London: Verso, 1995).

³³*Id.*, at 177.

³⁴*Id.*, at 178.

fairness of traditional arrangements and has contributed to changes in attitudes and practices by masses of women and men.³⁵ It has been suggested that this type of "intra-social transformation" may be more effective than legislation or other state interventions to deal with some social problems, such as pornography.³⁶

The public sphere also contributes to the enlargement of critical public activity through the direct engagement between civil society and the state in debate about what is wrong and what ought to be done. It enables citizens to expose injustice in state and economic power and makes the exercise of power more accountable:

The public sphere is the primary connector between people and power. We should judge the health of a public sphere by how well it functions as a space of opposition and accountability, on the one hand, and policy influence, on the other. In the public sphere political actors raise issues, publish information, opinions and aesthetic expression, criticize actions and policies and propose new policies and practices. When widely discussed and disseminated, these issues, criticisms, images and proposals sometimes provoke political and social change.³⁷

Even in the more limited model of representative democracy, governmental legitimacy depends upon responding to policy agendas that emerge through broad public discussion.

One of the ways that the public sphere works is by transforming self-interests into general ones. It is in this social space that preferences, interests, beliefs and judgments are not simply expressed and registered but shaped through discourse. The process of discussion moves people from private

³⁵Although the transformation is by no means complete!

³⁶Young, at 179.

³⁷*Id.*, at 174.

interest to common interests.³⁸ This is the transformation from the singular to the first person plural: from what I need, to what we require.

Under conditions of social inequality, the common good or general interest can often serve as a means of exclusion. This is why in a majoritarian democracy, minority viewpoints get treated as "special" interests which are seen to be outside of, or even conflicting with, the common good. In these circumstances, the "common good" can be used to perpetuate exclusion and social injustice. However this dichotomy between special and common interests is a faulty one.³⁹ Socially situated interests, proposals, claims and expressions of experience are not simply self-regarding interests. They are actual differences in perspective that need to be taken into account and provide an important resource for democratic discussion and decision-making.⁴⁰

Politics is often seen as either a competition among private and conflicting interests or a situation in which political participants put aside their particular interests and affiliations to form a community. Neither of these views is correct.⁴¹ Within this broader model of democracy, the expression of all particular perspectives must be encouraged and must have an effective opportunity to help to shape the outcome of deliberations.

The development of common interests in a way that does not marginalize minority viewpoints involves the transformation of the style and terms of public debate, including through the fundamental recognition of diverse perspectives. This opens the possibility for significant change in outcomes. This is not to suggest that the public sphere should be seen as an easygoing discussion. It is often the site of contentious struggle.

³⁸Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984), at 224.

³⁹Young, at 7.

⁴⁰Seeing "difference as a resource" which helps to transform the general interest through reasoned communication is one of the strongest of Young's contribution to the theory of deliberative democracy in *Inclusion and Democracy*.

⁴¹*Id.*, at 8.

A strong civil society and public sphere does not replace a strong state. The capacity of the public sphere to solve problems on its own is limited. A robust public sphere strengthens rather than weakens state and representative governmental functions.⁴²

With respect to legal developments the public sphere can be seen to function in the following way. Interests and problems are generated in the processes in civil society. Active citizens engage in deliberations on these matters within the public sphere. These deliberations result in critical public opinion which is translated into legislative enactment and judicial application within the constitutional state. The legitimacy of laws and judicial decisions in turn depends upon their congruence with the outcome of critical public deliberations.

Ideally the public sphere can play an important role in monitoring the actions and effects of state, economy and civil society. It can also actively promote limits of each of these segments and ensure a balance between them. The strengthening of both state and civil society is required to deepen democracy and undermine injustice, especially that deriving from private economic power.

The concept of public sphere is further refined in the next sections through an exploration of the nature and qualities of discourse and the role of basic rights norms within deliberative practices in the public sphere.

B. Discourse and the Public Sphere

The term public sphere can be used in two ways: as a pure description of a network of deliberations that joins sectors of society; or as a normative construct that embodies the values of communicative democracy. From the former perspective, the public sphere is simply a "structured setting" which may or may not be transformed into a more democratic arena of popular participation and cultural

⁴²*Id.* at 174-5 and 189. Discussion on the nature and role of representation in deliberative democracy at 121-148.

contestation. Whether or not this transformation takes place depends on "distributions of power, participatory and associational capacities, and popular political cultures."⁴³

This distinction between the descriptive and normative usages is further illustrated in the recognition that "today, we face a paradox in that while the public sphere is expanding impressively, its function has become progressively insignificant."⁴⁴ This is partially due to the large, but now contracting, role that the state has played in shaping the public realm over the last fifty years or so.⁴⁵ In order to move toward the normative ideal, this "politically" constituted and dominated public sphere must be replaced by one that is shaped by an independent civil society comprised of private persons and related associations.

A public sphere which embodies the norms of communicative democracy will not develop spontaneously: it has to be consciously created and re-created. Much work has been carried out to specify the conditions under which the public sphere can fulfill its democratic function. For example, Habermas has proposed that this requires: channels of communication that link the public sphere to a robust civil society in which citizens first perceive and identify social issues; a broad range of informal associations; a responsible mass media; and agenda-setting avenues that allow broader social concerns to receive formal consideration within the political system.⁴⁶

In addition to these structural aspects of the organization of the public sphere, great emphasis is placed on the nature of deliberative practices within it. This involves the active participation of individuals in communicative processes of decision-making. Habermas has been at the forefront of developing an ideal form of discourse to meet these requirements, while Young, and others, have

⁴³Somers, "Rights, Relationality and Membership", at 74.

⁴⁴Habermas, *The Structural Transformation of the Public Sphere*, at 4.

⁴⁵Habermas, *The Structural Transformation of the Public Sphere*, at 222-235 and *Beyond Facts and Norms* at 329-387.

⁴⁶*Between Facts and Norms*.

refined and elaborated this model by addressing some pragmatic concerns. Discourse thus refers to the overall network and cumulative outcome of deliberative practices as well as the form of these individual deliberations.⁴⁷

This section describes this normative model of discourse. It also sets out the principles applicable to deliberative practices. Moving from modelling to application gives rise to a number of barriers, challenges and issues. These are briefly set out and discussed at the end of this part.

(i) A Normative Model of Discourse

The objective of developing a normative model of discourse is two-fold: to make explicit the implicit norms that shape healthy deliberative practices and to develop ideal conditions under which these practices can flourish. This model serves as a foundation upon which to build the public sphere. Discourse is a practice characterized as "a form of argumentation where the intention is to win the assent of a universal audience to a problematic proposition in a non-coercive but regulated contest."⁴⁸ It is fundamentally a process of reason.⁴⁹ Like rights norms, reason does not have an independent

⁴⁷The term discourse can be confusing because it is used in at least three ways in contemporary social sciences and jurisprudence to denote the way that language is linked to wider social and cultural processes. Discourse is used to refer to: (1) a particular class of discourse types or conventions (i.e. the discourse of biology); (2) as a set of deliberative practice of particular institutions (i.e. the courts' human rights discourse; and (3) as the process of talk and interaction between people and the products of that interaction. See discussion in Fairclough, *Discourse and Social Change*, at 3-5.

⁴⁸Habermas, *Between Facts and Norms*, at 67.

⁴⁹Habermas is often seen as the "last great rationalist" as he defends the possibility of reason under current social and economic conditions against the onslaught of post-modernist views. One of his approaches to this problem is to postulate different conceptualizations of reason. For example in *Knowledge and Human Interests* (trans. Jeremy Shapiro, Boston: Beacon Press, 1971) he refined the concepts of instrumental, practical and emancipatory reason. In *Between Fact and Norms*, Habermas uses "reason" in the sense of practical reason which is reciprocal and intersubjective, as opposed to instrumental reason, which is a more limited form of rationality geared toward control of the other. Each form of reason correlates with a form of action, thus practical reason is achieved through communicative action and instrumental reason works through purposive-rational or strategic action. Young incorporates Habermas's view of practical reason in her definition of "reasonableness" but approaches this problem more pragmatically by emphasizing that there are other important forms of political communication besides rational

existence. Conceptions of reasonableness are affected by culture, structure and one's position within a given dialogue. However, through discourse a shared view of what is reasonable can be developed.

The discourse principle encompasses a concept of rationality that is intimately linked to intersubjective consensus. This principle states that: "only those norms are valid to which all affected persons could agree as participants in rational discourses."⁵⁰ In discourse, it is possible to isolate and test the disputed claim solely on the basis of arguments. Participants in discourse put forward and criticize claims and arguments. Participants sort out good reasons from bad, valid from invalid arguments and do not rest until the "force of the better argument" compels them all to accept a conclusion.⁵¹ This entails deliberative exchanges in which participants express puzzlement or disagreement, pose questions, and answer them. These exchanges enable participants to transcend, although not abandon, their initial culturally- and structurally- defined views.

This normative concept of discourse presupposes a shift in the point of view from which we handle problems. This is a move from a narrow goal-oriented perspective to one from "which we examine how we can regulate our common life in the equal interest of all."⁵² In public deliberation, citizens transform their preferences according to public-minded ends and reason together about the nature of those ends and the best way to achieve them.

Within discourse, there is a duty to hear the other side and to listen to arguments presented in the terminology and language of others. This is a dialogic and conversational process, rather than a contractual one with a fixed outcome. Dialogue encapsulates the idea of a continuous conversation

argumentation that are important within communicative democracy.

⁵⁰This is Habermas's discourse principle which was originally developed in the context of communicative ethics but which he now applies more broadly. See for example, *Between Facts and Norms*, at 107.

⁵¹Young, at 22-3.

⁵²Habermas, *Between Facts and Norms*, at 161.

rather than a moment in which issues are settled once and for all.⁵³ This description can be favourably contrasted with the more traditional yes/no, win/lose adversarial approach with which we are all too familiar.

Within the boundaries of the public sphere actors can acquire only influence not political power.⁵⁴ Actors gain influence by participating in discourse through communicative action. Communicative action is oriented towards the achievement of mutual understanding and rationally motivated consensus.⁵⁵ It works toward achieving a consciously agreed definition of the meaning, value and implications of the particular situation under consideration. The practice of communicative action is tied in with being reasonable: when people talk they aim to understand each other.⁵⁶

While it is not a predominant form of public debate at present, communicative action is a natural form of interaction:

Whenever we want to convince one another of something, we always already intuitively rely on a practice in which we presume that we sufficiently approximate the ideal conditions of a speech specially immunized against repression and inequality. In this speech situation, persons for and against a problematic validity claim thematize the claim and, relieved of the pressures of action and experience, adopt a hypothetical attitude in order to test with reasons, and reasons alone, whether the proponent's claim stands up.⁵⁷

⁵³Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis" (1998) 26 *Politics and Society* 143, at 155.

⁵⁴Habermas, *Between Facts and Norms*, at 371.

⁵⁵Habermas contrasts this normative view of communicative action which is by definition interactive to strategic action where communication is more unidirectional and geared toward the attaining specific results or goals. The latter much more prevalent in current discourses. He discusses this in many places in his work including in *Toward a Rational Society: Student Protest, Science and Politics*, trans. Jeremy Shapiro (Boston: Beacon Press, 1970) and *The Theory of Communication Action, vol. 1 - Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1984).

⁵⁶Young, *Inclusion and Democracy*, at 38.

⁵⁷Habermas, *Between Facts and Norms*, at 229.

Communicative action is a reflexive form of interaction. Reflexivity is a dynamic process of reflection. The term is used to refer to "a more dialogic or conversational process, one that involves people calibrating their actions with others."⁵⁸ Reflexive practices help to make what we are barely aware of more obvious and therefore more available to our conscious efforts to change. For example, under this approach privilege and power become subjects for discussion and deconstruction.

Discourse is unique in that it requires participants to share perspectives in a way that "unleashes the higher-level intersubjectivity of the deliberating collectivity."⁵⁹ This involves reaching an "intersubjective" consensus, that is a perspective that integrates the perspectives of each participant's worldview and self-understanding in a manner that is neither coercive nor distorting.⁶⁰ Discursively-produced and inter-subjectively shared beliefs have a motivating force. The shared belief that is produced between speaker and hearer through discourse implies a tacit acceptance of obligations relevant for action.

This normative model of discourse encompasses a fairly abstract and idealized notion of dialogue. However, the qualities noted are not that different from what we intuitively know is a good discussion. In more pragmatic terms, deliberative practices can be seen to encompass:

- an opportunity to be heard without interruption or distortion of one's views;
- an assumption that one is speaking honestly, without a hidden agenda;
- an interest in understanding one's views and to seek agreement where agreement exists;
- an acknowledgement of the importance of one's feelings about this issue;
- an opportunity to share doubts about one's own positions without that ambivalence being marked as a sign of weakness;
- a readiness on the others' part to admit doubt, learn, change;
- a recognition that difference does not mean enmity.⁶¹

⁵⁸Winslade and Monk, *Narrative Mediation*, at 120.

⁵⁹Habermas, *Between Facts and Norms*, at 228.

⁶⁰*Ibid.*

⁶¹Dukes, *Resolving Public Conflict*, at 69.

Discourse theory aims to make explicit these types of implicit deliberative norms. It goes further than the qualities listed above in that it specifies conditions under which discourse can take place. These conditions emphasize: (1) the essential role of reason as the only factor that shapes the process and outcome of discourse; (2) the requirement to isolate and exclude the effects of power and privilege; (3) the transformation of interests and preferences through public, critical, reflexive participation in deliberative practices.

(ii) Principles for the Operation of the Public Sphere

Young has developed a number of principles have been developed with a view to facilitating discourse and the recreation of the public sphere. These are: inclusion, political equality, reasonableness and publicity.⁶²

The principle of inclusion holds that a democratic decision is normatively legitimate only if all those affected by it are included in the process of discussion and decision-making. Inclusion requires an unending effort to reduce the marginalization of community members and subgroups.

Political equality ensures that discourse is free from domination and that the results arise from good reasons rather than fear or false consensus. The conditions of equal opportunity to speak and freedom from domination encourage all to express their needs and interests. The equality condition also requires a reciprocity to the extent that each participant acknowledges that the interests of the others must be taken into account in order to reach a conclusion.⁶³

⁶²Young, *Inclusion and Democracy*, at 23-5. Another approach is to see participation as requiring adherence to four basic principles of justice: equality, inclusion, mutuality and stewardship. (Todd R. Clear and David R. Karp, *The Community Justice Ideal: Preventing Crime and Achieving Justice* (Westview Press, 1999) at 108-128). While there is some overlap between the two sets of principles, Young's approach is preferred in the context of this study for a number of reasons. She discusses these principles in greater detail, they are seen to apply throughout society not simply in the justice system, and they are more closely tied in with the concept of discourse and the requirements of communicative democracy.

⁶³Young, *Inclusion and Democracy*, at 30.

The third principle is reasonableness. This stipulates that people enter discussion to solve collective problems with the aim of reaching agreement. It does not imply that agreement is always reached but it underscores the need for procedures for reaching decisions and registering dissent in the absence of agreement. In part, reasonableness entails having an open mind. This means that participants cannot come to the discussion with binding commitments to prior norms or unquestioned beliefs. Nor can they assert their own interests above that of others or insist that their initial opinion about what is right or just cannot be subject to revision:

To be reasonable is to be willing to change our opinions or preferences because others persuade us that our initial opinions or preferences, as they are relevant to the collective problems under discussion, are incorrect or inappropriate. Being open thus also refers to a disposition to listen to others, treat them with respect, make an effort to understand them by asking questions and not judge them too quickly. A reasonable respectful process of discussion exhibits deliberative uptake: when some speak, others acknowledge the expression in ways that continue the engagement.⁶⁴

The final principle is that of publicity. This has several components. First, participants in a discourse must form a public in which people hold one another accountable. A public consists of a plurality of individuals with different collective experiences, interests and so on, that come together to discuss collective problems under a common set of procedures.

Publicity also refers to the form or expression or action utilized in discourse. This relates back to the principles of inclusion and reasonableness. People discussing public issues must present their claims, arguments, appeals, stories or demonstrations in ways that try to be accessible and accountable to anyone. Deliberative practices are public in the further sense that participants always speak with "the reflective idea that third parties might be listening."⁶⁵

It is these four principles working together that enhance the transformative potential of discourse.

⁶⁴*Id.*, at 24-5. On the idea of deliberative uptake see James Bohman, *Public Deliberation* (Cambridge, Mass: The MIT Press, 1996) at 58-9, 116-8.

⁶⁵Young, *Inclusion and Democracy*, at 25.

It is because participants are answerable to others and mutually committed to reaching agreement, that they come to understand that their best interests will be served by aiming for a just result.⁶⁶ It is this accountability which is key to translating interests and preferences that are initially constructed in ways that cancel out or ignore the legitimate interests of others, into public expressed interests and preferences that are compatible with justice.⁶⁷ It is this "collective critical wisdom" that enables a judgment that is not only normatively right in principle but is also sound.⁶⁸

These principles positively describe some specific ways that communicative democratic processes can produce respect and trust, make possible understanding across structural and cultural difference, and motivate acceptance and action.

iii) Barriers to Discourse

This section identifies some of the barriers, challenges, and issues confronted in moving from the normative ideals of discourse theory to their practical application. These barriers are identified here in general terms and will be addressed in greater detail in subsequent discussions on the role of the courts and other institutions in achieving social justice.

One set of barriers to achieving this normative model of discourse arise from current cultural practices that are associated with the adversarial system. These practices privilege rancorous and divisive debate characterized by verbal and physical intimidation, name calling, labelling, stereotyping, deception and deliberate distortion of the opponent's words. These practices are far from the deliberative, reflexive practices outlined in the discourse model. Adversarial cultural

⁶⁶*Id.*, at 28.

⁶⁷*Id.*, at 30. See also Habermas "A Genealogical Analysis of the Cognitive Content of Morality," in *The Inclusion of Other: Studies in Political Theory* (Cambridge, Mass, MIT Press, 1998).

⁶⁸*Ibid.*

practices encourage speaking and penalize listening.⁶⁹ The goal of an adversarial proceeding is not to develop understanding, nor to find constructive solutions, nor even as originally conceived, to discover the 'truth.' Rather, the goal of speech in these situations is to win.⁷⁰ While this may be particularly true of litigation and quasi-adjudicative hearing processes, these cultural practices infect many other public processes.

Current practices appear to leave little room for reflexive, informed public debate. They result in distortions in public understanding, in deliberations, and in resulting policy-making processes. The lack of adequate structures for public discourse has many negative implications, including: labelling and polarization; an agenda dominated by 'issues' more than actual problems; and, an agenda limited by a narrowly defined range of potential solutions.⁷¹

These negative cultural practices can be overcome by developing alternative ones that enhance individual and institutional capacity for discourse. This involves the intentional creation and fostering of deliberative structures and related cultural practices. Examples of processes that encapsulate these qualities can be found today.⁷² These include: large group intervention planning

⁶⁹Barber, *Strong Democracy*.

⁷⁰Dukes, *Resolving Public Conflict*, at 130.

⁷¹*Id.*, at 129.

⁷²See discussion of various models in *id.*, at 72-4. I highlight some of these models here.

methods;⁷³ study circles;⁷⁴ policy juries;⁷⁵ the "listening project";⁷⁶ and diversity training and prejudice reduction projects.⁷⁷

At present, these deliberative structures and practices co-exist with the dominant adversarial ones. Renewed efforts must be made to directly challenge the prevailing confrontational approach and design more fora that foster deliberative practices. It is important to emphasize that these practices need to become more widespread, they cannot be reserved to "professional" participants in public debate, that is members of the media, bureaucrats, politicians and so on.⁷⁸

The need to increase individual and institutional capacity for deliberation is related to a second challenge, that is the need to enhance critical, reflective public opinion. Public opinion plays an

⁷³See discussion in section 3.3B(ii).

⁷⁴Originally developed in Sweden, study circles work by developing and distributing at no charge materials on various matters of public concern along with information about how to facilitate effective discussion groups. This method is intended to foster deliberative democracy and is based on the conviction that knowledge and participation are forms of power. In the US, this model has been implemented by the Study Circles Resource Center. It has been used for deep problems including community violence, race relations and the Gulf War. R. Corson, "Study Circles: building knowledge, participation and power" (1991) *Focus on Study Circles* 5.

⁷⁵Policy juries are made up of randomly-selected group of members of society who hear substantial testimony about prominent issues and make policy recommendations. It provides an opportunity for individuals to educate themselves and to have input into the process and for governments to hear from people who have become knowledgeable about an issue. This model has been used for issues such as farming, water quality, and public health. K. Miller, "Minnesota 'juries' tackle policy issues" (1989) 4 *Consensus* 8.

⁷⁶The Listening Project is an innovation of a grassroots peace organization in North Carolina, Rural Southern Voice for Peace. Volunteers who are trained in conflict resolution and communication skills conduct surveys of people in their own communities about a particular issue or controversy. These volunteers are generally advocates for a particular perspective, but they approach the community surveys with the idea that they must first understand people's concerns and needs before taking action. The premise is that when people's concerns are heard and understood that they are most open to the possibility of dialogue and even change. It has been used for many issues including church response to homophobia, economic conversion and sustainable agriculture. Rural Southern Voice for Peace, "The Listening Project: how it works" (1993) 71 *Voices* 8.

⁷⁷Originally developed in the 1960s as a means of facilitating inter- and intra-group conflict resolution, these models are still widely used. For example, they are now an important component of judicial education seminars. The goal of these training models is not to develop agreement on specific issues but more generally to develop insight about the origins and power of one's own identity as a means to enhance understanding and respect for the identity of others.

⁷⁸Dukes, at 68.

important role in providing the background for the deliberation of issues in the public sphere. At the present time, there are only very limited forms of public opinion. The two main sources of public opinions are on the one hand, those developed in informal, personal and nonpublic fora, and formal, institutionally authorized opinions, on the other.⁷⁹ Critical publicity involves the development of autonomous public opinion that mediates between these two existing sources.⁸⁰ Critical public opinion is formed through types of communication in which virtually as many people express opinions as receive them and there is the opportunity for others to effectively answer back. This opinion formation is independent of state and economy and gives rise to effective action against these authorities where necessary.⁸¹

The practice of polling for public opinion will rarely contribute to critical publicity. The yes/no format of these questions is not conducive to dialogue. Generally-speaking, there is no opportunity for the respondent to ask questions or to posit other options. This approach can be contrasted with focus group discussions where there is opportunity for participation, dialogue and reflection.⁸² For example, in the wake of the terrorist attacks in the United States major Canadian newspapers reported that the majority of Canadian are prepared to accept limitations of Charter rights in order to address terrorism. The phrasing of the questions and the lack of opportunity for reflection undermines the validity of these responses. It is unlikely that a similar type of response would have resulted from even a limited dialogue on this topic framed by more information and greater context. The problems experienced with public opinion polls are shared by several other methods to increase

⁷⁹Habermas, *The Structural Transformation of the Public Sphere*, at 245.

⁸⁰For recent discussions on the problems and possibilities of critical public opinion see: Justin Lewis, *Constructing Public Opinion* (New York: Columbia University Press, 2000); Niklas Luhman, *The Reality of the Mass Media* trans. Kathleen Cross (Stanford: Stanford University Press, 2000); Jacob Shamir and Michal Shamir, *The Anatomy of Public Opinion* (Ann Arbor: University of Michigan Press, 2000).

⁸¹*Ibid.* Habermas cites to C.W. Mills, *The Power Elite* (New York, 1956) at 303-4. This is contrasted with the current "mass" opinion which is dominated by media and the state.

⁸²Several models of facilitated dialogue were noted above.

participatory democracy such as referenda.⁸³ These methods are more likely to limit rather than expand dialogue and critical thinking.

The potential for discourse is also hindered by unreflected social and institutional practices. Deliberative practices require increasing our capacity for reflection at both the individual and institutional levels. Reflection opens up new lines of thinking, new ways of interpreting the context, and facilitates the search for other potential models of action.⁸⁴ Reflection is central to learning from experiences.⁸⁵

The quality of reflection is central to how a person makes meaning of what is occurring. It is the dynamic interaction of action, that is having the experience, and reflection that helps a person interpret and reinterpret the experience. To learn deeply from experience, people must critically reflect on the assumptions, values, and beliefs that shape their understanding.⁸⁶ A reflective capacity can be built into institutional practices by establishing "learning review processes" within an organization.⁸⁷

Another, and perhaps the major, challenge posed in implementing the normative model of discourse is the fundamental inconsistency between the requirement of political equality and the reality of

⁸³The concern has been expressed in these terms: "Because they cannot measure intensities of belief or work things out through discussion and discovery, referenda are bound to be more dangerous than representative assemblies to minority rights." D. Butler and A. Ranney, "Theory" in *Referendums - A Comparative Study of Practice and Theory* eds. D. Butler and A. Ranney (Washington: American Enterprise Institute, 1978) at 36.

⁸⁴Victoria Marsick and Alfonso Sauquet, "Learning Through Reflection", *The Handbook of Conflict Resolution* 382-399, at 383.

⁸⁵*Id.*, 384.

⁸⁶*Id.*, at 385.

⁸⁷P. Cranton, ed., *Transformative Learning: Insights from Practice* (San Francisco: Jossey-Bass, 1997); V. Marsick and K.E. Watkins, *Facilitating the Learning Organization: Making Learning Count* (Aldershot: Gower, 1999); J.D. Mezirow, "Transformative Theory of Adult Learning" in M.R. Welton, ed., *In Defense of Lifeworld: Critical Perspectives on Adult Learning* (Albany: State University of New York Press, 1995). See discussion of these models in Chapter 5, section 5.2.B.

structural inequality. Methods must be developed within deliberative practices to directly address this apparent contradiction. The discourse model has been heavily criticized for disregarding the distorting effects of entrenched power relations on political dialogue.⁸⁸ A related criticism is that in formulating his conception of deliberative democracy Habermas places too great a reliance on reasoned argument in public discourse. This is seen as problematic both because it is impractical and excludes many from participation.⁸⁹

These challenges have been directly addressed in Young's work through her focus on the context of cultural differences and structural inequality. She defends Habermas' proposals and addresses these criticisms by emphasizing inclusion as a principle of discourse and by recognizing other forms of communication in discourse. She summarizes her reconciliation in these terms:

First, I do not offer practices of greeting, rhetoric and narrative as substitutes for argument. Normative ideals of democratic communication crucially entail that participants require reasons of one another and critically evaluate them. These modes of communication, rather, are important additions to argument in an enlarged conception of democratic engagement. Greeting, I claim, **precedes** the giving and evaluating of reasons in discussion that aim to reach understanding. If parties do not recognize and acknowledge one another, they will not listen to arguments. Rhetoric always **accompanies** argument, by situating the argument for a particular audience and giving it embodied style and tone. Narratives sometimes are important parts of larger arguments, and sometimes enable understanding across difference in the absence of shared premises that arguments need in order to begin.⁹⁰

In this way, she is able to accommodate a more profound understanding of difference without abandoning the fundamental importance of reason in public discourse or the ultimate goal of

⁸⁸For example, I Meszaros, *The Power of Ideology* (New York: New York University Press, 1989) criticizing Habermas's creation of the conception of the ideal speech.

⁸⁹See for example, Somers, "Rights, Relationships and Membership", at 74.

⁹⁰Young, *Inclusion and Democracy*, at 79. Young's ideas concerning narratives are discussed in Chapter 4, section 4.3.B(i).

reaching an intersubjective consensus. Habermas has incorporated some aspects of this approach in his more recent work.⁹¹

Structural inequality can be addressed by dealing directly with difference and particularity within processes of public decision-making.⁹² This involves taking proactive steps to draw all social groups into the dialogue and safeguard full and diverse participation in the strongest terms. The public sphere has an important role in ensuring that the positive valuing and transcending of difference takes place.

Inclusion and equality must be written into the structure of all deliberative practices. This goes beyond formal inclusion and extends to recognizing and valuing non-dominant forms of communication and participation. Within properly constructed deliberative practices, difference and the revealing of structural inequalities can be seen as resources, rather than as negative features.⁹³ Explicit inclusion and recognition of differentiated social positions provides critical resources for dialogue that aims to promote social justice. It maximizes the social knowledge available to a democratic public, such that citizens are more likely to make just and wise decisions.⁹⁴ Inclusion contributes directly to more reasonable and fairer solutions to problems. Paying specific attention to differentiated social groups in discussion and encouraging public expression of their situated knowledge makes it more possible than it would be otherwise for people to transform conflict and disagreement into agreement.⁹⁵ It motivates participants in political debate to transform their claims from mere expressions of self-regarding interest to appeals to justice.

⁹¹Habermas, "Struggles for Recognition in the Democratic State" in *The Inclusion of Other* 203-236.

⁹²Young, *Inclusion and Democracy*, at 118.

⁹³Interestingly, similar insights have been made at a micro-level in discussions of dispute resolution process. For example, in *Beyond Winning*, Mnookin, Peppet and Tulumello see difference as a resource to forming creative solutions in problem-solving negotiation, at 17 and *passim*.

⁹⁴Young, *Inclusion and Democracy*, at 115.

⁹⁵*Id.*, at 118.

The barriers and challenges to discourse within the public sphere outlined here can be overcome by insistence on the principles set out above: inclusion, political equality, reasonableness and publicity. These principles are intimately connected to human rights norms and in particular, the right to equality. This leads into the following discussion on the role of rights in the public sphere.

C. Human Rights and the Public Sphere

Much of the discussion of the public sphere and discourse is carried out without reference to rights. In fact, there is no consensus on the role of rights within the public sphere. Some theorists argue that there is no role for rights in structuring discourse while others ascribe a large and fundamental role to rights.

Many of those who favour a more deliberative or communicative democracy believe that rights are anathema to dialogue.⁹⁶ This approach is similar to the general critique of rights presented in the first chapter. From this perspective, introducing rights into dialogue discourages citizen activity because it relies on representative principles and introduces abstract grounds such as natural right or higher law, rather than allowing people to deal directly with problems.⁹⁷ The ideology of rights is deemed to be incompatible with participation and community. Rather than mitigating power, rights are seen to operate as protection for those who hold power and who generally have their interests and image reflected in these rights. Thus, rights tend to justify the existing order as 'natural, necessary, just.'⁹⁸

⁹⁶See for example, discussion in Dukes, *Resolving Public Conflict*, at 136-139, 149-50.

⁹⁷Barber, *Strong Democracy*. Barber's view is based on the idea that citizens must be engaged directly in deliberative practices. However, some of the functions that he sees for "talk" are consistent with my perspective on human rights as a social practice. He identifies nine functions of talk: the articulation of interests; persuasion; agenda-setting; exploring mutuality; affiliation and affection; maintaining autonomy; witness and self-expression; reformulation and reconceptualization; community-building as the creation of public interests, the common good and active citizens (at 178-9).

⁹⁸See, for example, J.F. Handler, "Dependent people, the state and the modern/post-modern search for the dialogic community" (1988) 35 *UCLA Law Review* 999.

This perspective is grounded in a much more limited view of the dynamics of rights than the one adopted in this study. It does not appreciate the fact that human rights are dissimilar to, and operate quite differently from, other legal rights. As presented here, human rights are inherently transformative. In addition, human rights have a capacity to be interpreted in a relational way. This does not mean that they always have been. However, rights do not have to be understood solely as being resolved in an adversarial contest and defined starkly in either/or terms. Human rights practices are contests over meaning and values in concrete situations. The outcomes can rarely be described in win-lose terms.

Human rights can and do have a very different meaning and function in systems which encourage participation. The anti-rights perspective can be contrasted with the view that rights have an indispensable role to play in a participatory discourse.⁹⁹ Human rights norms have an important role to play both in shaping the structure of participation within public discourse, and in informing the substantive content of these deliberations. Rights are elements of the legal order and relate directly to the ordering of all of these practices.

Human rights discourse is one facet of deliberations within the public sphere. The construct of the public sphere is a fruitful one for refining our understanding of the potential of transformative human rights practices in several ways.

First, individual participation in the public sphere directly contributes to self-development and self-determination and hence to social justice.¹⁰⁰ The focus is often on the ways in which participation in formal legal procedures such as litigation can be empowering for marginalized groups. The finding of "voice" and re-creating identity through, for example, adjudication is in itself an important

⁹⁹For example, Habermas stresses the importance of a system of basic rights in normative discourse. Young criticizes distributive conceptions of rights in *Justice and the Politics of Difference*, but develops a relational view of rights which is incorporated into her later model of communicative democracy. Young's view on the role of rights has made a strong impact on the understanding of the right to equality in Canadian scholarship (for example, see Jhappan, Iyer).

¹⁰⁰Young, *Inclusion and Other*, at 180.

contribution to discourse.¹⁰¹ However, it is also important to acknowledge that this effect can be gained through more informal methods for collaborating in the process of realizing rights.¹⁰²

Secondly, the public sphere is a social space in which novel interpretations of human rights norms can develop. A clear example of how the public sphere can function in this way is the evolving public discussion on sexual harassment and its link to women's equality rights. Women had long experienced inappropriate and harmful treatment by men on the job and suffered the consequent stress, fear, pain and humiliation. However, for many years, it was a problem with no name and no remedy. In the 1970s and 1980s, women started talking about their experiences to each other and to wider publics.¹⁰³ Over time this resulted in a language as well as a social, moral and legal theory about sexual harassment. Eventually, procedures were developed to deal with this problem.¹⁰⁴ Although sexual harassment has not been eradicated, it is now seen as an injustice and treated by legal institutions as a specific harm and infringement of women's right to equality.

Human rights are "unsaturated," they must be interpreted and given concrete shape in the public sphere and within state institutions in response to changing circumstances.¹⁰⁵ Rights discourse is malleable even though a certain level of determinacy has been achieved through the existing process of adjudication.¹⁰⁶ While rights interpretation is an ongoing living project, human rights norms are also relatively fixed. These norms have a core meaning that is strong enough to permit them to

¹⁰¹Thornton, "Citizenship, Race, Adjudication," at 337-9.

¹⁰²E.W. Schwerin, *Mediation, Citizenship Empowerment and Transformational Politics* (New York: Praeger Publishing, 1995)

¹⁰³Young emphasizes the role of narrative in these developments in *Inclusion and Democracy*, at 72-3.

¹⁰⁴Arjun Aggarwal, *Sexual Harassment - A Guide for Understanding and Prevention* (Toronto: Butterworths, 1992); Kathleen Gallivan, "Sexual Harassment after *Janzen v. Platy*: The Transformative Possibilities" (1991) 49 *University of Toronto Faculty of Law Review* 27.

¹⁰⁵Habermas, *Between Facts and Norms*, at 125-6.

¹⁰⁶Colin Harvey, "Governing After the Rights Revolution" (2000) 27 *Journal of Law and Society* 61 at 86-7.

promote discourse. This apparent paradox is explained in the next aspect of the relationship between human rights and the public sphere.

While human rights are the subject of deliberation, they also have a fundamental role in shaping the structure of practices within the public sphere. Discourse requires a system of rights. Equal opportunities to participate and communicative freedoms require legally structured deliberative practices.¹⁰⁷ In particular, a system of basic rights¹⁰⁸ guarantees participation and ensures a balance between the private and public autonomy of individuals.¹⁰⁹ Private autonomy guarantees the right of individuals to pursue their personal success and happiness and public autonomy guarantees the citizen's right to self-government through political participation. In order to be valid, discourse must be consistent with basic rights, including substantive and procedural equality norms.¹¹⁰

Finally, thinking in terms of the public sphere reinforces the need for broad public discussion and decision-making about how a human rights norm should be applied in specific circumstances. These fluid, provisional judgments are possible even under conditions of differences of perspective.¹¹¹ This normative construct expands the role for dialogue and reasoning within critical public discussion.

It highlights processes of influence rather than power; reasoning and listening, rather than

¹⁰⁷Habermas, *Between Facts and Norms*, at 127.

¹⁰⁸Habermas's system of basic rights is set out under five broad categories: (1) negative liberties (2) membership rights and (3) due process rights which together guarantee individual freedom of choice and thus private autonomy; (4) rights of political participation which guarantee public autonomy (and also enables citizens to further define the rights they enjoy as "privately autonomous"); and (5) social welfare rights which become necessary insofar as the effective exercise of civil and political rights depends on certain social and material conditions. *Between Fact and Norms*, at 121-6.

¹⁰⁹*Id.*, at 118.

¹¹⁰As noted in Chapter 2, several theories of the legitimacy of judicial review are based on the primary function of the courts in ensuring democracy. However, in general there notions of democracy and political equality are much more limited than the ones advocated here.

¹¹¹Young, *Inclusion and Democracy*, at 43.

competitive bargaining. These are all qualities that are essential to transformative human rights practices.

The public sphere can only be created and maintained by an energetic civil society.¹¹² However, state institutions and particularly the courts, also have a important role to play in promoting a broader human rights discourse that helps to sustain this social space.

3.3 Promoting a Broader Human Rights Discourse

This normative account of the public sphere emphasizes the importance of consciously constructing the role of public discourse in democracy. Civil society has a very important role in rights developments. Operating through the public sphere, civil associational activity contributes to problematizing issues, formulating them in terms of rights and advancing and actualizing new social practices that fulfill human rights norms. The examples of progress made on changing gender-based divisions of labour and understanding sexual harassment bear this out.

However, intra-social transformations of this kind are limited. Most social problems need to be dealt with both within civil society and through state action. The public sphere is also the social space in which these two segments meet and interact. Social transformation requires reformed social practices and state interventions to dismantle structures of inequality. While most accounts of communicative democracy focus exclusively on the way civil society interacts with political actors, in this study the spotlight is on legal institutions.¹¹³

For the sake of simplicity, this chapter refers specifically to the role of the courts. However, many of the points raised here are also applicable to the roles of human rights commissions and tribunals,

¹¹²Habermas, *Between Facts and Norms*, at 369.

¹¹³I deal with political institutions, and particularly legislatures, only to the extent that they interact with the courts.

particularly but not exclusively in terms of their adjudicative function. The implications of this discussion for the commissions/tribunals is addressed in Chapter 5.

The normative features of the public sphere and of discourse set out in the previous section provide a framework for an elaboration of the reconceived role of legal institutions as facilitating a broader human rights discourse. This elaboration begins with an investigation of the way that courts and other institutions can promote deliberation and transformative human rights practices. In addition, it reviews the nature of the dialogue between and among legal institutions, political institutions and other sites of human rights discourse and practices.

As noted at the outset of this discussion, The dialogue between courts and legislatures can be seen as a form of artificial deliberative community. Making this dialogue more effective contributes to a broader human rights discourse and to sustaining conditions for the public sphere. A stronger public sphere in turn fosters a natural deliberative community within which rights can move "from the margin to the mainstream." This movement occurs through integrating deliberation about the interpretation and application of rights into, and between, a multiplicity of participatory, reflexive and reflective structures and processes.

The capacity to reconstruct an effective public sphere exists today. The fact that this potential has not been achieved does not mean that the principles needed do not exist, rather it means that such principles are insufficiently exercised.¹¹⁴ Courts have an important role in enunciating these principles and in overseeing their operation. Public participation in deliberations about the interpretation and application of human rights contribute to the exercise of these principles on a continuing basis. Transformative human rights practices help to create community and contribute to a vital public sphere.

¹¹⁴Habermas, *Between Facts and Norms*.

A. The Role of The Courts

The traditional understanding of the courts focuses on the judicial function of resolving disputes involving a variety of legal rights and providing specific remedies where a right has been infringed. The courts' role in promoting human rights is understood in much broader terms here. This approach supplements but does not displace the initial, more circumscribed view of the judicial role.

A more extensive account of the judicial function incorporates the role of promoting a broad human rights discourse. In orthodox legal scholarship, law brings communication to an end by providing a definitive conclusion to a matter.¹¹⁵ But in this transformative approach, law plays several roles in initiating and shaping dialogue. These roles can be delineated in relation to the public sphere as encompassing four activities and interactions.

First, courts create and maintain the conditions of discourse by protecting and promoting basic human rights norms and principles. Courts have a well-understood role in safeguarding democratic processes, protecting minorities, as well as limiting factionalism and self-interested representation.¹¹⁶ They can accomplish this directly through decisions that order the inclusion of individuals or groups in specific processes. Canadian caselaw on this issue relates principles of democracy directly to equality rights norms.¹¹⁷ This role could also be extended more generally to measures that address

¹¹⁵Harvey, "Governing After the Rights Revolution", at 69.

¹¹⁶The American jurisprudence on this point is canvassed in Cass Sunstein, *One Case at a Time* (Cambridge, Mass: Harvard University Press, 1999).

¹¹⁷The Supreme Court of Canada has recognized that Canadian courts have this function in two cases, although in neither case did the Court find that there has been a breach of a Charter right. In *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, the Court held that the government cannot provide a platform of expression in a discriminatory fashion or in a way that otherwise violates the Charter. The Court also recognized that issues of expression may on occasion be strongly linked to issues of equality. In *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, the applicant group of Aboriginal women sought to have an order preventing the federal government from providing further funding to four Aboriginal organizations in connection with the constitutional amendment process. It argued that the four organizations were male-dominated and did not represent the interests of aboriginal women, in particular in connection with the issue of the application of the Charter to systems of aboriginal government. The Supreme Court found that the evidence did not support the contention that the funded groups were less representative of the viewpoint of Aboriginal women. However, the Court recognized that section 15 could be

structural inequalities and make society more inclusive. The connection between democracy and equality has been drawn even more clearly in articulating general principles of Charter review and interpretation. For example, former Chief Justice Dickson has reasoned stated this relationship in these terms:

[C]ourt[s] must be guided by the values and principles essential to a free and democratic society which I believe embody, to name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹¹⁸

Courts also help to create political equality indirectly by educating legislatures and society through the articulation of human rights principles.

Secondly, courts take in ideas and opinions developed by civil society in the public sphere and produce authoritative statements about rights. Law is a separate system within society with its own practices, structure and vocabulary, therefore events outside it must be converted into legal language. It is within the process of translation and interpretation that law develops and maintains its existence separate from politics.¹¹⁹ The process of translating public values into positive law, by legislation or judicial decision contributes to a broad human rights discourse. The courts have a unique role to play in this dialogue. Their unique role is due to their commitments to "self-critical rationality" and the "flesh and blood of the actual case."¹²⁰

Thirdly, these authoritative statements are carried out through activity in the state, economy, and

violated where a platform of expression has been provided on a discriminatory basis.

¹¹⁸*R. v. Oakes*, [1986] 1 S.C.R. 103, at 106

¹¹⁹Habermas, *Between Facts and Norms*. The operation of law is not simply the operation of power or coercion, the dynamic is much more complex.

¹²⁰M. Perry, *The Constitution, the Courts and Human Rights* (New Haven: Yale University Press) at 111. See also, M. Perry *The Constitution in the Courts* (New York: Oxford University Press, 1994).

civil society. Courts posit an interpretation of these human rights norms, which is then taken up in dialogue in the public sphere. Through this more inclusive dialogue, the statements are deliberated upon, accepted or rejected, and applied in a variety of circumstances. Judgments are legitimated to the extent that are accepted as valid by citizens in the public sphere.

Consensus on the interpretation of a human right in a specific situation is often conceived narrowly in terms of the judiciary or the legislature, or the interaction between the two. The role of judicial decisions is to offer up interpretations of rights for inclusion in the broader discourse of the public sphere and eventual adoption as part of the social consensus:

A judge's decision is no more than a contribution to a social practice constantly in flux and is operative insofar as it becomes part of the network of conduct and attitudes comprising that practice.¹²¹

Fourthly, it is important to recognize that courts do not monopolize the interpretation of rights. Other actors maintain an independent role in this process played out within the public sphere. For example, legislatures do so in their capacity as lawmakers. In addition, rights are interpreted and applied on a daily basis without reference to the courts. An example of this latter point is the interpretation and application of equality rights in the work place through the assessment of existing norms and the collaborative development of accommodations.

Reasoning and deliberation are not solely within the province of any restricted group of people, with or without legal qualifications and experience:

In some ways, courts may be expert reasoning forums, but the constraints of reasoning within the domain of law, and the restrictions on who may participate in the deliberations, mean that courts do not have the sort of open dialogue with respect to available arguments and available sources of argument that discourse theory requires.¹²²

¹²¹Carlos S. Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996) at 218.

¹²²Campbell, "Democratic Aspects", at 32-33. (referring to *Between Facts and Norms*).

Discussions about human rights should be diffuse within society and should involve the participation of all those liable to be affected by the group decision in question. Within the public sphere, individuals and organizations do not simply pursue effective private interests, but effective public judgments about how to apply norms in specific situations.¹²³ In fact, it has been argued that transformative dialogue takes place mostly outside of formal settings.¹²⁴

Flowing from this wider definition of the judicial role are questions about how courts could be designed in order to more effectively fulfill these functions related to promoting a broader human rights discourse. From this perspective, institutional reform must highlight ways to engage members of the public in this discourse on the meaning and application of human rights.

Court procedures should comply with the deliberative principles of inclusion, political equality, reasonableness and publicity. At one level, this requires a review of existing practices to see if they are consistent with transformative human rights practices. Processes of adjudication should become more deliberative and adversarial practices need to be tamed. More specifically, these principles have implications for the conduct of litigation including rules on standing and intervention as well as doctrines and procedures to redress imbalances between parties. In order to be open to taking up opinions developed in the public sphere, courts will need to re-think the sources, types and extent of evidence required in human rights cases and may have to be active and interventionist in ensuring that it deliberates on the basis of a full record.¹²⁵

¹²³Barber, *Strong Democracy*, at 173. Mark Tushnet goes further by proposing a "populist constitutional law" which would mean "people acting outside the court can ignore what the courts say about the Constitution as long as they are pursuing reasonable interpretations of the thin Constitution." in *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) at 186.

¹²⁴See for example, Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 *Yale Law J.* 1860 at 1862; Frank Michelman, "Law's Republic" (1988) 97 *Yale Law J.* 1493, at 1531.

¹²⁵These issues are further elaborated in Chapter 6.

At another level, courts must not only ensure that their practices are consistent with discourse principles, they must also pay special attention to the development of substantive legal principles to shape deliberative practices in other fora. This involves expanding current approaches to democratic rights, rights to freedom of expression, association and assembly and equality rights. This expansion could take place in conjunction with giving greater content to the phrase "free and democratic society" in section 1 of the Charter¹²⁶ and augmenting and refining the interpretation and application of the fundamental principles that underlie the constitution.¹²⁷ Two specific directions for doctrinal reform are: replacing the current focus on the representative democracy with a communicative model and developing a greater appreciation for the effects of structural inequalities.

The courts need to refine their institutional theory in order to take into consideration these broader functions. Since the advent of the Charter, Canadian courts, and particularly the Supreme Court of Canada, have more consciously considered and pronounced on their role within society. As discussed in Chapter 2, this has extended to employing the dialogue metaphor to describe the relationship between courts and legislatures. This reflective practice must continue and be abetted by considerations of this theory of review within the public sphere.

In more general terms, judicial discourse must become more visible and be translated into accessible language.¹²⁸ Courts need to justify their opinions before an enlarged critical public that extends far beyond the existing culture of experts:

Thus, judicial decision-making must not just be concerned with self-referential modes of reasoning or with the self-understanding of elites who deal with law as experts, but that of all participants.¹²⁹

At the same time, the public sphere needs to be developed so that it has the capacity to take important court decisions and make them the focus of effective public controversies.

¹²⁶For an excellent overview of s.1 jurisprudence with respect to reasonable limits to equality rights see Sheila Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *Canadian Bar Review* 299.

¹²⁷This is Patricia Hughes' proposal, as discussed in Chapter 1.

¹²⁸Ignatieff, *The Rights Revolution*.

¹²⁹Habermas, *Between Facts and Norms*, at 445.

B. Additional Sites for Human Rights Discourse and Practices

(i) Formal Institutions

In addition to the courts and human rights commissions, there are a number of other formal state institutions which can be seen as potential sites for transformative human rights practices. The foremost of these are legislative bodies.

The legislatures fulfill many of the same functions as the courts in promoting a broader human rights discourse and contributing to changing social practices. For example, legislatures make authoritative statements concerning human rights norms during the lawmaking process. In theory at least, legislators must consider the constitutional validity of laws as one of the steps in the process leading to their enactment. Similarly, legislatures can take in ideas and opinions developed in the public sphere and translate them into laws that extend the enjoyment of human rights.

The promotion of human rights discourse is in effect an area of shared jurisdiction between the legislatures and the courts. The legislatures are not generally considered to be highly proficient at the proactive review of laws to ensure their compliance with human rights norms. At present, courts appear to have a clear advantage in this respect, even though their review is only initiated retrospectively (although with a prospective impact). However, the innate capacity of legislatures to give effect to these norms through statutes is clearly superior to the potential impact of judicial decisions. The relative institutional capacity of courts and legislatures is a fluid one. It can be influenced dramatically by the attitudes of judges and legislators to their role in promoting human rights as well as by changes in institutional structure and practices.

To illustrate this point, the legislature could have an increased role in this discourse by more seriously scrutinizing its decisions in light of human rights norms. This would in a sense involve exercising a quasi-judicial review of its own. This scrutiny could be institutionalized for example in a legislative committee established for this purpose that would add to the internal review carried out within the bureaucracy. Legislative committees have the advantage of being public. This method

of internalized self-reflection on its own decisions has the further benefit of inducing legislators to keep the normative content of human rights in mind from the very start of their deliberations.¹³⁰

Notwithstanding this essential fluidity, the relative institutional capacity of the courts and legislatures is fundamentally shaped by the differences in deliberative practices between the two. Whereas the judicial process is at its core a process of deliberation and reason, the legislative process is shaped by other factors, notably power relationships between various interests.

Legislative bodies could increase their capacity to promote human rights discourse in two ways. One step is to improve the nature of their internal deliberations so that they are consistent with the discourse principles of inclusion, political equality, reasonableness and publicity. The second measure is to strengthen their connection to the public sphere. Mechanisms that could be employed toward this end include: specific formal requirements for public debate and consultation; disclosure of relevant information; and explicit reference to a checklist of factors which must be considered in the course of legislative drafting, parliamentary process and enactment.¹³¹ All of the mechanisms serve to make the legislative process more participatory and reflective.

In addition, the cultural practices which operate within legislative bodies would have to be altered so that they more closely approximate the norms of discourse. For example, debates would have to shift away from the current preoccupation with gaining advantage and become oriented towards the achievement of mutual understanding and rationally motivated consensus. This would involve more listening and the cultivation of deliberative uptake, that is the acknowledgment of the expression of others in a way that continues engagement.

Both of these categories of reforms involve redesigning political institutions so that the normative model of discourse plays a central role in the processes of opinion and will formation. This would

¹³⁰*Id.*, at 241.

¹³¹*Ibid.*

have to involve the formulation of meaningful, participatory and reflective consultation processes as a main connection point to civil society in the public sphere. It requires working toward inclusion and political equality by acknowledging disparities in public forums and opening them to previously unseen faces and unheard voices. It may extend to the requirement to rethink the representativeness of legislatures to ensure the direct inclusion of a broader diversity of perspectives. The French statute adopted in the last year with the aim of increasing the number of female representatives is one example of this type of reform.

More participatory and public forms of government that strengthen the interaction between the state and the public sphere does not obviate the need for representation. Participation and representation are not alternatives, rather they require each other. This relationship can be understood in these terms:

Institutions of representation help organize political discussion and decision-making, introducing procedures and a reasonable division of labour. Thereby citizens have objectives around which they can organize with one another and participate in anticipatory and retrospective discussion, criticism and evaluation. Without such citizen participation, the connection between the representative and constituents is most liable to be broken resulting in elite rule.¹³²

Many of these comments are equally applicable to other formal sites where civil society interacts with state agents. There is an overarching requirement to develop institutional frameworks that promote communicative action. This involves, for example, developing more participatory administrative practices. At present this is accomplished through various institutional arrangements that act as checks on administrative power. These include: participation of clients, the use of ombudspersons, quasi-judicial procedures, and hearings.¹³³ These arrangements could also be reworked to further integrate deliberative practices that are consistent with human rights norms.

¹³²Young, *Inclusion and Democracy*. Interestingly, Young makes these comments with respect to the courts as well as political institutions. See also Ignatieff, *The Rights Revolution* on this point.

¹³³Habermas, *Between Facts and Norms*, at 440.

Participatory administrative practices are not surrogates for legal protection, rather they extend the reach of transformative human rights. This is critical because many executive and bureaucratic processes have a more direct impact on the experience of rights norms by individuals than do statutes or judicial decisions.

(ii) Informal Spaces and Fluid Institutions

In order to fulfill its functions within a broad human rights discourse, the public sphere needs to be developed so that it has the capacity to make political acts and judicial decisions the subject of effective public deliberation. A balance must be struck between formal, rule-bound fora for the interaction between state and public sphere and informal spaces for transformative human rights practices.¹³⁴ At present, there are a number of fora of this type including labour/management committees and university equity programs. Transformative practices should be integrated in these sites and additional space should be created toward this end.

Expanding the public sphere raises novel questions of institutional design, the need for new types of institutions and the requirement for enhanced communication links. In general terms, the creation of a strong public sphere requires that citizens have formal access to both indoor and outdoor spaces for the staging of public events aimed at calling attention to issues, expressing opinions and calling for action.¹³⁵ This extends to having access to public media and electronic means of communication. This emphasis on a greater of sites must be matched by a focus on the quality of human rights practices within them.

Running the certain risk of creating an oxymoron, I suggest that one possibility for increasing deliberation is through the creation of 'fluid institutions'. Fluid institutions are short-lived and

¹³⁴For a general discussion of the requirement for a balance between formal and informal practices in contemporary democracy see Barbara Mistral, *Informality: Social Theory and Contemporary Practice* (London: Routledge, 2000).

¹³⁵Young, *Inclusion and Democracy*, at 168.

characterized by flexible procedures. Models for this kind of informal institution include a number of large group intervention methods.¹³⁶ The following section highlights a number of these models although they form only part of a much larger range of methods that can be developed based on cultural, situational and other variables.¹³⁷

The basic methodology of the large group intervention approach is to gather all those affected by a specific decision or action together to participate in an ad hoc discussion and decision-making. This involves creating a new kind of dialogue about the situation the participants jointly face. It is a "very participative" approach: people express their views, they listen to others, they have "voice" and they are heard.¹³⁸ Participants do not necessarily make every decision, but they have the opportunity to influence other people, as well as the ultimate consensus. Properly structured, these methods can embody the qualities of communicative democratic processes.

One example of a large group intervention method is "Open Space Technology."¹³⁹ It is the most fluid and flexible example of these processes. Open Space technology is unique in that instead of using designed activities in preplanned groupings, it places the responsibility for creating and managing the agenda on the participants. The broad outline of this technique is that the participants meet at the beginning as a large group to identify topics for discussion related to the overarching

¹³⁶There are many working models of these methods used for future planning and managing large-scale change. For example see: M.Emery and R.E. Purser, *The Search Conference: A Powerful Method for Planning Organizational Change and Community Action* (San Francisco: Jossey-Bass, 1996); R.W. Jacobs, *Real-Time Strategic Change* (San Francisco: Berrett-Koehler, 1994); D.Klein, *Simu-Real: A Simulation Approach to Organizational Change*" (1992) 28 *Journal of Applied Behavioral Science* 566-578; H.Owen, *Open Space Technology: A User's Guide* (Potomac, Md: Abbot, 1992). H. Owen, *Tales from Open Space* (Potomac, Md: Abbot, 1995). For an overview, see B.Bunker and B.T. Alban, *Large Group Interventions: Engaging the Whole System for Rapid Change* (San Francisco: Jossey-Bass, 1997).

¹³⁷For example, Lederach has proposed an "elicitive model" through which conflict resolution models can integrate local, cultural needs with general knowledge of conflict intervention and resolution. J.P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse: Syracuse University Press, 1995).

¹³⁸Barbara Bunker, "Managing Conflict Through Large-Group Methods" in *The Handbook of Conflict Resolution* 546-567, at 548.

¹³⁹Owen, *Open Space Technology: A User's Guide; Tales From Open Space*.

theme. Participants then meet in self-selected small groups to discuss each of the topics. These discussions are reported back to the whole group. There is no structure for weaving together these discussions into a whole, although one can spontaneously emerge if sufficient consensus is achieved. It is a divergent process for allowing ideas to emerge and develop and results in the creation of "really good conversation." It has been suggested that Open Space Technology is very effective in highly conflicted situations.¹⁴⁰

One of the underlying assumptions of large group intervention methodology in general is that groups tend to overestimate the area of conflict and underestimate the amount of common ground that exists. These methods all focus on the common ground that underlies diverse interests:

The processes that create this kind of agreement across diverse interests occur within individuals as well as at the group and systems levels. Individually, people arrive seeing the world and the future from the perspective of their own interest. At this point individuals are egocentric, meaning they do not fully understand other views or interests. In the course of discussions, acquiring new information, and trying to move toward agreement, they begin to understand (if not agree with) others at the table. Their boundaries become less rigid and they become more flexible in looking for solutions that might offer gains both for themselves and others in their table team. As they engage in this cooperative process, the atmosphere at the group level becomes supportive and affirming. The group begins to feel successful. One symptom of this shift in perspective is that rather than saying I there is a noticeable increase in the use of we.¹⁴¹

These processes foster the realization that participants can get what they want through a collaborative process. They promote changes in viewing the situation and create the openness to develop and consider alternatives. One explanation for the success of these methods is that power processes, and particularly hierarchy, are counteracted through the fluid structure. Since there is no decision structure, there is no way of gaining or exercising power. The normal way of talking, interacting and making decisions is suspended. This makes room for more inclusive and reasonable forms of interaction. Since participants cannot rely on authority structures, it makes them responsible for their own activity. These methods expand the individual's egocentric view of the situation by

¹⁴⁰Bunker, "Managing Conflict Through Large-Group Methods", at 562.

¹⁴¹*Id.*, at 554.

exposing her to many points of view in heterogeneous groups that do real tasks collaboratively and develop group spirit. This broadens views and educates. The focus is on common ground, and area of agreement rather than difference or competitive interest.

This methodology could be employed to foster human rights discourse. For example, this type of fluid institution could be used to address the ongoing difficulties experienced in sorting out and implementing human rights principles and the practices relating to sexual assault law. This subject has been a busy but ultimately problematic field for women's equality rights advocacy over the last two decades, and one that has resulted in a tug of war between Parliament and the courts.¹⁴²

The problems experienced with the implementation of sexual assault law reform can be attributed in large measure to cultural practices in criminal law.¹⁴³ The framework of existing values does not appear to have been directly affected by attempts at legislative reform and certainly have not been transformed by the never-ending court battles. Rather, these legal developments have spawned a backlash that has created additional harm for many women in many instances. This negative dynamic has resulted in the call for direct action in the form of challenging the practices of individual lawyers through disciplinary complaints before law societies.¹⁴⁴ However, the convening of a forum on this subject, following the Open Space Technology methodology described above, may be more effective than the proposed adversarial approach. In particular, it has the potential to develop a common understanding of the need for systemic change and the impact of equality norms on existing practices. This method is particularly useful in situations such as this, where there is no overarching institution that has the capacity to take charge of the implementation process and to foster transformative human rights practices.

¹⁴²See discussion in Chapters 1 and 2.

¹⁴³McIntyre, Sheehy, Lakeman and Boyle, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" at 13-14.

¹⁴⁴*Ibid.*

C. Enhancing Dialogue Between Sites of Discourse

The construct of the public sphere and the related emphasis on a normative model of discourse also provide assistance in rethinking the relationships between courts and legislatures and among other sites of human rights practices. Inter-institutional dialogue can be seen as mediated by the public sphere. Renewed emphasis on dialogue between institutions and between state institutions and the public sphere is an important component of promoting a broader human rights discourse.

(i) Courts and Legislatures

The concluding section of Chapter 2 provided an overview of recent analytical and jurisprudential developments in which dialogic theories are applied to the relationship between the courts and legislatures. It was suggested that this amounted to only a partial reconception of the role of the courts within democracy. The limitations stem from the fact that the dialogue metaphor has been evoked only at a fairly superficial level to date and the focus has been exclusively on the relationship between legal and political institutions. The public sphere framework with its integral focus on normative deliberative practices provides a foundation upon which to revisit and augment this nascent theory of judicial review. It also provides practical guidance for improving this inter-institutional dialogue.

The dialogue between courts and legislatures has mainly been seen in terms of the legislative response to judicial decisions where the government disagrees with the result in a specific case. This interaction has been described in these terms:

...the Court, assisted by the efforts of aggrieved litigants, starts the conversation by drawing the attention of the legislature to fundamental values that are likely to be ignored or finessed in the legislative process. The Court, however, does not attempt to end the conversation or conduct a monologue in which its common law or Charter rulings are the final word. All of the common law presumptions were premised on the idea that the legislature could clearly authorize departures from them in particular contexts. The underlying assumption was that

democracy would be enhanced by requiring the legislature to deliberate and to indicate clearly its desire to depart from the values of the common law constitution.¹⁴⁵

Rather than seeing this institutional relationship in terms of a an issue-specific dialogue, I suggest that it should be seen as an ongoing discourse. This proposal does not entail more direct interactions between courts and governments as the dialogue would continue to operate through judicial decisions. However, judicial decisions would be cast in broader terms that would facilitate different kinds of responses from the government.

An example is perhaps the best way to illustrate this point. Section one of the Charter requires governmental institutions to justify any limits on rights on the basis that they are reasonable and consistent with the principles of a free and democratic society. This is an important terrain for the ongoing discourse between the courts and the legislatures. In developing analytical frameworks for assessing the justifications proffered by governments, the courts play an important role in establishing principles and educating governments as to their obligations with respect to constitutionally-protected rights.

Under the limited dialogue metaphor, emphasis is placed on the courts responsibility to take this responsibility more seriously by showing "a willingness to examine public value justifications to see whether such justifications were in fact rooted in, or were merely a disguise for, existing relations of power."¹⁴⁶ In this way, the courts apply a reasoned analysis to the actions of other institutions of governments. In effect, judges apply the deliberative task "to social practices that had previously been accepted as natural and inviolate."¹⁴⁷ This is a necessary but insufficient role. In addition to deliberating on whether a given exercise of state power is consistent with human rights norms, courts have an important function to encourage deliberative practices within government. By developing

¹⁴⁵Roach, "Constitutional and Common Law Dialogues", at 531.

¹⁴⁶*Ibid.*, at 72.

¹⁴⁷C. Sunstein, "Interest Groups in American Public Law" (1985) 38 *Stanford L.Rev.* 29 at 58.

overarching principles, courts can have an important prospective and normative impact on future government deliberations.

The dialogue between legal and political institutions has been characterized as the courts "bringing to the table the importance of fundamental values and procedures that may be inconvenient for the legislature to consider" and the legislatures "bringing to the table a knowledge of its regulatory objectives."¹⁴⁸ This division of labour is problematic because it suggests that rights are merely bargaining chips in the legislative process that can be balanced and traded off against other valued elements.¹⁴⁹ In my view, the legislature must also be seen to have a responsibility to consider the impact of human rights norms in a prospective way. A genuine dialogue only exists when legislatures take this responsibility seriously. Through an ongoing discourse, the courts can assist the legislative capacity in this regard, not only with respect to specific cases, but as an essential aspect of constitutional governance.¹⁵⁰

At present there are two major barriers to an effective dialogue between the courts and legislatures. The first is the weakness of deliberative practices within government discussed in the previous section. The second is undue judicial deference to the legislature caused by lack of consensus about the judicial function with respect to human rights norms, particularly in the form of constitutional review. The greatest danger to democracy arise when courts uphold legislation that clearly and unreasonably violates the Charter.¹⁵¹

In addition to advancing our theoretical understanding about the relationship between courts and

¹⁴⁸Roach, "Constitutional and Common Law Dialogues" at 531.

¹⁴⁹This point was made by Mary Eberts in her address on "The Promise and Paradox of Legal Strategies" at the Opening Plenary Session at the national forum on *Transforming Women's Futures* (Vancouver: November 4, 1999).

¹⁵⁰This point is elaborated on in Chapter 7.

¹⁵¹Roach, "Constitutional and Common Law Dialogues", at 532.

legislatures, the normative model of discourse provides practical guidance on how to make this dialogue more effective. It suggests institutional means to facilitate these deliberative practices. For example, it suggests that judges need to be self-conscious about the way their decisions are framed, with an eye not only on the specific case but also its more general role shaping the deliberative practices within government. This may involve formulating a judgment at various levels of abstraction in order to fulfill these distinct but related purposes.

The discourse model also has important implications for the dialogue between the courts and legislatures with respect to remedies. This also has to be seen as an ongoing discourse rather than limited conversation. Remedies to systemic inequalities should not prescribe specific institutional changes, but should instead set up institutional mechanisms for ongoing change.¹⁵²

The implementation process can best be seen as a process of dialogue between the courts and other institutions. For example, in *Brown vs. Board of Education*¹⁵³, the US Supreme Court had real fears that political opposition would defeat its decision.¹⁵⁴ To deal with this concern:

The Court placed itself in position to engage in a continual colloquy with political institutions, leaving it to them to tell the Court what expedients of accommodation and compromise they deemed necessary. The Court would reply in the negative - and did eventually once so reply --only when a suggested expedient amounted to the abandonment of the principle."¹⁵⁵

Most frequently, Canadian courts either prescribe a specific remedy or provide only very general guidance leaving it up to the legislatures to fashion an appropriate response. Thus, the dialogue

¹⁵²Colleen Sheppard, "Caring in Human Relation and Legal Approaches to Equality" (1992) 2 *National Journal of Constitutional Law* 304 at 344. See also C. Sheppard, *Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993).

¹⁵³347 US 483 (1954).

¹⁵⁴A. Bickel, *The Least Dangerous Branch* 2d ed. (New Haven: Yale University Press, 1986) at 254.

¹⁵⁵*Ibid.* The case where the Court intervened in the name of principle was the Little Rock case of *Cooper v. Aaron* 358 U.S. 1 (1958).

metaphor is strained here, given the lack of give and take on remedial issues. A more transformative approach to remedial discourse is required.¹⁵⁶

(ii) Multiple Sites

The dialogue between the courts and the legislatures does not take place in a vacuum. It is mediated by the public sphere. This mediation process works in two ways.

First, deliberations in the public sphere have an impact on the nature, shape and outcome of the inter-institutional dialogue. The legitimacy of laws and judicial decisions in turn depends upon their congruence with the outcome of critical public deliberations.

Where a decision is inconsistent with critical public opinion on the meaning of a rights norm it can lead to renewed energy within the public sphere and, in some cases, state action to counteract the ruling. This was the dynamic, for example, that was initiated in reaction to a Supreme Court of Canada decision that invalidated a Criminal Code provision protecting women from certain types of questioning when they were victims in a sexual assault trial.¹⁵⁷ Negative reaction to this decision and ensuing public consultations resulted in greater recognition of women's equality rights in this context.¹⁵⁸ In this way, judicial review is one element of a dialogue between governmental institutions and the public leading to a "more self-critical political morality".¹⁵⁹ It contributes to a re-evaluation of societal norms and practices leading to social learning.¹⁶⁰

¹⁵⁶This is discussed in Chapter 7 as it is not seen as simply a bilateral dialogue between courts and legislatures but rather a multilateral one involving civil society and taking place in the public sphere.

¹⁵⁷See discussion in McIntyre et al., "Tracking and Resisting Backlash"; Roach, "Constitutional and Common Law Dialogues" at 524-30.

¹⁵⁸Bill C-49 extended to the redefinition of legal construction of consent in sexual assault trials which was related to the issue in *Seaboyer*, but extended beyond it.

¹⁵⁹Perry, *The Constitution, the Courts and Human Rights*.

¹⁶⁰Habermas, *Between Facts and Norms*.

Secondly, and more generally, norms develop through transformative human rights practices in many sites within the public sphere. This is why it is wrong to focus exclusively on the relationship between legal and political institutions. The existence of multiple sites for deliberative human rights practices can be seen to increase movement toward social justice in several ways.

Multiple conversations about rights norms maximize the social knowledge available within the public sphere and therefore contribute to effective public judgments about these norms and their applicability. This point can be explained further by linking up the concepts of discourse and social change. Where there is only one discourse, the emphasis is on following established norms. When there are multiple discourses, the fragmentation contributes to a process of articulation, disarticulation, and rearticulation of norms thereby opening up spaces for change. When conventions can no longer be taken as given, participants must negotiate which discourse elements are to be drawn upon. This involves critical reflection and deliberation on existing norms and practices.¹⁶¹

One of the most important points that can be drawn out from this analysis is the potential of multiple discourses in increasing the openings for social change. This supports the view that rather than working toward a unitary view of human rights concepts and practices, a more transformative approach entails encouraging multiple sites and forms of practice.¹⁶²

Social transformation can occur when different discourses combine under particular social conditions to produce new, complex discourse.¹⁶³ Courts can play an important role in assisting in the production of this new, coherent discourse. It does not do so in a hegemonic way but, rather, by mediating between the various rights interpretations made within the public sphere and providing a tentative reconciliation that can then become the subject of further conversations. In this way,

¹⁶¹Fairclough, *Discourse and Social Change*, at 96-99.

¹⁶²Additional sites are discussed in the next three chapters.

¹⁶³Fairclough, at 3-4.

courts can be seen as weaving together these separate discourses with a view to encouraging further dialogue.

Another argument in support of multiple sites of human rights discourse is based on the view that democracy and social justice require a balance between formal and informal practices. Informal bonds, debates and associations are valid platforms for exploring social problems, conflicts and disagreements.¹⁶⁴ In particular, informal contact has the potential to draw individuals into deeper relationships with one another thereby proving a fuller sense of individual recognition and trust.¹⁶⁵ Informal practices contribute to social trust and respect between members of society. However, informal practices permit exclusion and discrimination and therefore must be balanced by formal, rule-bound practices. Courts play an important role in maintaining a balance between formality and informality by providing background human rights norms which form the backdrop for informal practices. It is this balance which helps to facilitate people's cooperative and creative conduct and fosters social transformation.¹⁶⁶

This chapter has presented the construct of the public sphere and a normative model of discourse as a framework within which to reconceive the role of the courts in promoting a broader human rights discourse. This is the first aspect of the transformative ideal posited in this study. In some places, this discussion has included illustrative examples of the means by which this function is carried out, or could be carried out in a way that fosters social transformation leading to social justice. These mechanisms are explored in greater detail in subsequent chapters.

There is, however, a second element to the transformative ideal that must be elaborated before addressing its practical application in institutional design. This chapter has focused on the structural issues of the position of the courts in the constellation of state institutions, civil society and the

¹⁶⁴Mistral, *Informality*, at 4.

¹⁶⁵*Id.*, at 1.

¹⁶⁶*Id.*, at 8.

public sphere. It has acknowledged the ways in which current cultural practices based on the adversarial model hinder deliberation. This examination of the broader role defines a number of principles that are essential to discourse. They are equally applicable to the development of a normative conception of human rights practices. In order to be transformative, human rights practices must be inclusive, deliberative, reflective and participatory. The possibility of normative practices along these lines is examined in the next chapter through the presentation of the philosophy of transformative public conflict resolution and its practical application in mediation practices.

CHAPTER 4

INTEGRATING TRANSFORMATIVE MEDIATION PRACTICES

4.1 Overview

Legal institutions have an important role to play in promoting a broader human rights discourse. Human rights discourse can be conceived of as the dynamic set of interactions between legal institutions, other state institutions and civil society that takes place within the public sphere. These dynamics can be thought of as two sets of interrelated dialogues. One on the impact of basic human rights norms and principles on the structure of discourse, and another on the substantive meaning and application of these norms in specific contexts.

Provisional interpretations are given to human rights by a variety of institutions and actors. These become the subject of discourse and over time, they can become the subject of societal consensus. It is not only what courts, commissions or legislatures say about rights that is important, the opinions voiced by members of the public are also valid contributions to human rights discourse.

Human rights discourse can contribute to social transformation when it takes place under conditions that are consistent with the principles of inclusion, political equality, reasonableness and publicity. Courts and human rights commissions promote a broader human rights discourse by helping to create this normative structure on an ongoing basis. However, the structure of discourse can only be maintained through deliberative practices that are also consistent with human rights norms.

At present, cultural, societal and institutional practices are largely shaped by a distributive and competitive view of human relations based on a scarcity model of resources. This view of human nature and society advances adversarial practices that are concretized into legal forms and patterns

of public debate. Adversarial practices severely limit the possibilities for deliberation.¹ Broadening human rights discourse requires a shift to communicative, collaborative practices that foster deliberation. Legal institutions also have a potential role in assisting in this transition.

Over the last few decades, the limitations of the adversarial approach have been acknowledged and subjected to review and debate. Growing awareness about these limitations has led to many reform efforts to integrate "alternative dispute resolution" ("ADR") into the legal system.² The extent to which ADR has proved beneficial is open to question.³ A global evaluation of the impact of the ADR movement is difficult because of the lack of conceptual clarity in this rapidly evolving field. While conflict resolution practices can be traced back to time immemorial, the consideration of alternatives to litigation and bilateral negotiations in the legal system has a much shorter late 20th century heritage.

This lack of clarity can be seen on three dimensions: (1) lack of common terminology, consistently applied meanings and huge variations in practice; (2) lack of common criteria for assessing dispute resolution policy and practices; and (3) differences in the political or philosophical orientation related to the role and practice of dispute resolution. Much of the literature comparing ADR to adjudication uses idealized, and often undifferentiated models as the basis for comparison. Insufficient attention is paid to the subtleties of dispute resolution processes, their underlying views on conflict and conflict resolution and the institutions and structures in which they operate. The frailty of these conceptual underpinnings limits both the depth of comparative analysis and the potential of reform efforts.

¹One could go so far as to argue that, at least in its ideal or pure form, adversarial interaction is the opposite of deliberation since it requires the denial of the other party and the existence of common ground between the parties.

²There is a vast literature on the ADR movement including works at the theoretical, empirical, practical and policy levels. For an overview of this literature see Julie MacFarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications Ltd., 1999). See also: Report of the Canadian Forum on Dispute Resolution, *Charting the Course* (Ottawa: Department of Justice Canada, 1995).

³I share Carrie Menkel-Meadow's view that we have yet to develop a solid base for evaluation in the way of aggregate overall patterns ("When Dispute Resolution Begets Disputes of Its Own", at 1928).

Given the lack of a common framework, the potential of non-adversarial methods to deal with human rights conflict cannot be assessed in the abstract. Rather, this potential must be analyzed in light of both current practices and alternative practices that could be tailored to the human rights field.

This chapter concentrates on the potential of integrating transformative mediation practices into various procedures employed by human rights commissions. This exploration is one facet of how legal institutions could contribute to enhanced deliberative practices within human rights discourse.

The first section examines existing models of mediation and the current practices within Canadian human rights commissions. This review suggests the need to reconceive the potential of non-adversarial approaches. Conclusions cannot be drawn only on the basis of the relatively limited models of mediation and the narrow ways in which these models have been integrated into the human rights complaints process to date. Rather than using these models and practices as a baseline, a framework for evaluation should be based on alternative models of mediation that are consistent with normative deliberative practices.

The philosophy and principles of transformative public conflict resolution and the practice of narrative mediation provide a foundation for the development of an alternative model that is consistent with discourse principles. This philosophy and practice are presented and discussed in the second section.

The third section explores the broader potential of mediation as a transformative practice in the human rights setting. The implementation of these alternative approaches is not straightforward in this context due to current conceptions of procedural and substantive fairness that shape human rights practices. These boundaries are identified, discussed and reconceived within the framework established in this study. The specific issues addressed in this section are: the role of the mediator and neutrality; fairness and power issues; and human rights norms and the public interest.

This discussion echoes many of the themes developed in the previous chapter. Like the normative conception of discourse, transformative mediation requires a form of interaction in which the parties truly listen to each other and reach a resolution that incorporates mutual respect. Similarly, these normative models of discourse and mediation both focus on the transformation of initial interests developed from an individual perspective into a jointly-shared or intersubjective one. The nature of discourse and mediation dynamics and the role of rights within it are key to whether or not the outcome advances social justice.

4.2 Current Mediation Practices

This section provides a general definition of mediation and describes and main models of mediation that have been incorporated into the legal system. It provides a brief overview of mediation practices within Canadian human rights commissions and an account of mediation practices as observed at the British Columbia Human Rights Commission. Finally, it examines the limitations of current mediation approaches in contributing to transformative human rights practices.

A. Models of Mediation

(i) General definition of mediation

Mediation is ultimately a flexible process. It is impossible to give a universal accurate account of what transpires in mediation "since the process occurs across so many domains of conflict and since mediators often strive for quite contrasting goals, ranging from settling the substantive issues narrowly defined to accomplishing broad, relational psychological or social objectives."⁴ Despite these differences, researchers and reflective practitioners have captured certain regularities in mediation behaviour. This has contributed to a general definition and models of mediation practice.

⁴Kenneth Kressel, "Mediation" in *The Handbook of Conflict Resolution* 522, at 528.

In the most general terms, mediation is the process by which a third party assists parties to jointly develop a response to a problem, dispute or conflict. The core features of mediation are that it is:

- a decision-making process;
- in which the parties are assisted by a third party, the mediator;
- who attempts to improve the process of decision-making;
- through the use of a variety of skills and techniques; and
- to assist the parties to reach an outcome to which each of them can assent.⁵

This basic description is complemented by a long list of secondary objectives⁶ and variable features.⁷ Mediation is a fluid, multifaceted activity in which the same act may serve several purposes. It is often theorized as a structured activity proceeding in distinctive states, with various mediator behaviours predominating in each stage.⁸ The most salient features in distinguishing types of mediation are the different views of conflict and dispute resolution within which third party processes are analyzed.

Mediation is especially likely to prove useful whenever there are additional obstacles that would make unassisted negotiations likely to fail. These include:

- interpersonal barriers (intense negative feelings, a dysfunctional pattern of communicating);
- substantive barriers (strong disagreement over the issues, perceived incompatibility of

⁵Boulle and Kelly, *Mediation Principles, Process, Practice*, at 9. See also Christopher Moore's general definition of mediation as "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute". *The Mediation Process: Practical Strategies for Resolving Conflict* 2d ed. (San Francisco: Jossey-Bass, 1996).

⁶*Id.*, at 10.

⁷*Id.*, at 11.

⁸Kressel, at 529.

- interests, serious differences about the "facts" or circumstances); and
- procedural barriers (existence of impasse, absence of a forum for negotiating).⁹

Mediation is assisted negotiation. As a result the nature of the negotiation process between the parties will in large measure determine the type of role that the mediator is expected to play. The negotiation processes themselves reflect different understandings of conflict and conflict resolution.

(ii) Models of mediation in the human rights context

Mediation can serve a number of functions within the legal context: to define problems or disputes; to settle disputes; to manage conflict; to negotiate contracts; to formulate policy; and, to prevent conflicts.¹⁰ A number of approaches have been taken to categorizing the variations in mediation practice within the legal system.¹¹

The focus in this section is on the two main models of the mediation process that are recognized and applied within the human rights context. These are:

- (1) mediation as a step within an adversarial process where the focus is on facilitated bargaining; and
- (2) mediation in a collaborative process where the focus is on problem-solving techniques.

⁹*Id.*, at 526.

¹⁰Boulle and Kelly, at 13-15.

¹¹For example, Boulle and Kelly, set out four categories of mediation: settlement mediation; facilitative mediation; transformative mediation and evaluative mediation (see chart at 31-33). A similar approach can be found in Carrie Menkel-Meadow, "The Many Ways of Mediation" (1995) 11 *Negotiation Journal* 217, at 228-30 reviewing Deborah Kolb's *When Talk Works* (San Francisco: Jossey-Bass, 1994). The only difference is that "settlement" mediation is called "bureaucratic" mediation because of the emphasis on the court or other institutional setting tend to limit the types of potential processes and outcomes. An alternative approach to developing models of mediation is to focus on the types of interventions made by the mediator. These interventions can be classified as reflexive, contextual and substantive and also vary with respect to the degree of assertiveness, a dimension that cuts across these three categories. All of these forms of intervention can co-exist within a mediator's style. Kressel, "Mediation", at 529-35.

These models are a subset of the totality of mediation practices employed in large variety of settings. Right from the start, the current models of mediation in human rights practices can be characterized as constricted.¹² For example, models of mediation that have been developed in more relational or therapeutic contexts are being integrated into the legal context, particularly in the area of family law.¹³ As yet, these approaches have not been integrated into approaches in legal institutional settings dealing with human rights legislation or the Charter. These alternatives involve a more radical departure from current human rights practices and are discussed later in this chapter in the reconsideration of mediation and the development of an alternative transformative model.

A review of current approaches and practices of mediation in the human rights context is needed before work can begin on developing an alternative model. The following sections set out a brief description of each of the two existing models of mediation. This description includes a discussion of the underlying assumptions about conflict and conflict resolution each model entails, the role of the mediator, and a very general assessment of the advantages and disadvantages of each type.

a. Mediation as facilitated bargaining

The first model considered in this section is that of mediation as facilitated bargaining. This is the type of mediation that occurs the most frequently within the adversarial context of litigation. In this model, disputes are seen as static clashes of interests. These interests are reconciled through a process of positional or distributive bargaining. The term distributive refers to the idea that what one party gains in the process is at the detriment of the other party. It is a win/lose or zero-sum

¹²In fact, some would argue that these models of mediation are not mediation in a pure sense since they are inconsistent with the ideal of mediation as encompassing party autonomy. See for example, E. Waldman, "Identifying the Role of Social Norms in Mediation" (1997) 48 *Hastings Law Journal* 703.

¹³These can also be referred to as reconciliation, or client-centered and transformative mediation. Boulle and Kelly suggest that these approaches have been applied in "continuing relationship disputes: business, family, school, workplace, other organisations; also where contacts are unexpectedly terminated: business, employment, family (at 33). For examples and discussions of this approach, see: R. Baruch Bush, *The Promise of Mediation - Responding to Conflict Through Empowerment and Mediation* (San Francisco: Jossey-Bass, 1994); B.Landau, M.Bartoletti and R.Mesbur *Family Law Handbook* 2d ed. (Toronto: Butterworths, 1997); Stephen Erickson and Marilyn S. McKnight, *The Practitioner's Guide to Mediation - A Client-Centered Approach* (New York: John Wiley & Sons, Inc., 2001).

situation. Bargaining fits in with a traditional model of "democratic decision-making" in the sense that parties to a conflict are roughly symmetrical in power and on that basis are freely able to make choices about conflict processes and outcomes.¹⁴

The theory of facilitated bargaining is based on the methodologies of game theory and decision analysis which provide its scientific rationale.¹⁵ These quantitative approaches to modelling conflict and conflict resolution are based on a primary assumption of unchanging, fixed parties whose goals are to the maximization of their self-interest. This self-interest, which is static throughout negotiations, can be traded and compromised.

The interactions within a positional bargaining process can be described in this way:

This is associated with situations where the parties make extreme opening claims and attempt to persuade, coerce or trick the other side to move closer to their initial position. Where the parties require an outcome, they move closer to each other through a series of incremental concessions until they reach agreement. Essentially the parties move from their initial and subsequent positions in order to find a compromise accommodation. The point of compromise will be in a fairly predictable range around the mid-point between their opening claims.¹⁶

Successful negotiation is mainly a matter of technique or skill and the relative bargaining power of the parties. Where negotiations of this type take place in the context of a legal dispute, the process

¹⁴Schoeny and Warfield, "Reconnecting Systems Maintenance with Social Justice" at 254.

¹⁵Games theory and decision analysis develop mathematical models to explain and predict behaviour in conflict situations. These methodologies are based on the "rational actor paradigm, a set of basic assumptions about human behaviour that actors maximize their self-interested "payoff" or "utility" in interactions with others. From this perspective, bargaining is a interactive process in which rational actors attempt to maximize their "payoff". The classic statements of these approaches are: Thomas Schelling, *The Strategy of Conflict* (New York: Knopf, 1960); J. Von Neumann and O. Morgenstern, *Theory of Games and Economic Behaviour* (Princeton: Princeton University Press, 1947); Anatol Rapoport, *Fights, Games, Disputes* (Ann Arbor: University of Michigan Press, 1960), *Games Theory as a Theory of Conflict Resolution* (Dordrecht: D. Reidel Pub. Co., 1974), *Decision theory and Decision Behaviour: normative and descriptive approaches* (Dordrecht: Kluwer Academic Publications, 1989); Howard Raiffa, *Decision Analysis* (Boston: Beacon Press, 1970), *The Art and Science of Negotiation* (Cambridge, Mass: Belknap Press of Harvard University Press, 1982).

¹⁶Boulle and Kelly, at 52.

is also shaped by legal norms. In effect, parties are "bargaining in the shadow of the law."¹⁷ Litigation and settlement processes are affected by: substantive endowments (what laws apply); procedural endowments (what legal procedures apply); potential transaction costs of litigation; and, risk preferences from client's perspective.¹⁸ This means both that the process and party behaviour are affected to some degree by the likely resolution through the courts. Legal norms have an indirect impact on the process and outcome.

The third party role is to get agreement by applying pressure toward settlement and as a result this model is frequently referred to as "settlement mediation".¹⁹ The mediator's main role is to determine parties' "bottom lines" and, through relatively persuasive interventions, to move them in stages off their positions to a point of compromise. There is relatively limited procedural intervention by the mediator as the process is mostly characterized by the positional bargaining by parties.

In settlement mediation, the third party must in all circumstance remain neutral, that is not display a bias toward either party or the issues those parties brought to the table. Neutrality is key and this implies value-freedom as a virtue to be cultivated. In facilitated bargaining, the practitioners's role is to settle not resolve disputes. Disputant satisfaction, justice and equity are generally ignored or assumed to be a by-product of the process.²⁰ The labour-management model is often held out as the proto-type of mediation as a facilitated bargaining process. However, this model is broadly used in cases where the outcome is a divisible resource, especially money.

Another type of facilitated positional bargaining occurs when the mediator takes a stronger role in evaluating the potential legal outcome and plays a directive role in getting the parties to base their

¹⁷Robert Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950.

¹⁸Mnookin, Peppet and Tulumello, *Beyond Winning*, at 102.

¹⁹Boulle and Kelly, at 31.

²⁰For an interesting discussion of this point see J. Nolan-Hawley, "Court Mediation and the Search for Justice Through Law" (1996) 74 *Washington University Law Quarterly* 47.

settlement on these terms. This is referred to as "evaluative" mediation. In these processes, the mediator tends to have expertise in the substantive areas of the dispute with no necessary qualification in mediation techniques. The mediator's main role is to provide additional information, advise and persuade parties and to bring professional expertise to bear on the content of negotiations. The mediator has a high intervention role and consequently the parties have less control over the outcome. In effect, the mediator is a voice embodying "the shadow of the law." Although the evaluative mediation model places a greater priority on legal rights than most bargaining situations, the underlying process or dynamics are unchanged.²¹ Evaluative mediation is most often used in commercial, municipal, personal injury, trade practices, anti-discrimination, and matrimonial property disputes.²²

Mediation as facilitated bargaining fits in readily with the adversarial competitive system of litigation and North American legal culture. As a result, this type of mediation is relatively easy to practice and requires comparatively little preparation and training. In addition, outcomes are generally predictable and therefore fit in with expectations of legal justice. The understanding is that where the settlement is not in keeping with existing legal norms, it is less likely that the parties will settle.²³

The vast majority of legal disputes settle through negotiation. The problem of litigation dynamics is that cases usually settle late rather than early leading to high transaction costs, wasted time, and damage to relationships. All of these problems contribute to making disputes more expensive. In addition, where positional bargaining is accompanied by threats, personal confrontation and aggression, it has a potential to escalate conflict and to reduce the chances of settlement.

²¹Boulle and Kelly and others describe evaluative mediation as a separate model, but I am not persuaded that the changes in the mediator's role substantially affect the nature of the underlying process.

²²Boulle and Kelly, at 33.

²³However, this conclusion does not sufficiently take into account power differentials between the parties.

Mediation is a response to these concerns, since a third party can intervene to avoid some of these problems. From a justice system perspective, the most prominent goals for facilitating the bargaining process through mediation are cost-effectiveness and efficiency: saving money, reducing court loads and eliminating delay. The objective is to resolve disputes faster, at less cost and with greater satisfaction to the disputing parties than either unassisted negotiation or adjudication.²⁴

The main critique of this model of mediation is that it does not go far enough to deal with the disfunctions inherent in positional bargaining. For example, this process focuses the search for solutions very narrowly. Because it tends to reduce the negotiation to a single issue, there is a tendency to overlook many needs and interests. Positional bargaining ignores the possibility of finding value-creating trades other than saving transaction costs.²⁵ The ability of settlement-oriented or evaluative mediation to avoid these disadvantages is limited.²⁶

b. Mediation as facilitated problem-solving negotiation

The second model employed within the legal system is mediation as facilitated problem-solving negotiation. This model brings together a number of approaches that have developed in direct recognition of the shortcomings of positional bargaining. Consequently, it is best seen as a conscious alternative to the prevailing model. The core objective of this second approach is to make negotiation less competitive and adversarial and more cooperative and collaborative. At the heart of the problem-solving approach is interest-based negotiation as presented most famously by Fisher and Ury.²⁷

²⁴As with all "ADR" in the legal system, the real comparison is between unassisted negotiation and assisted negotiation since so few cases go to trial.

²⁵Mnookin, Peppet and Tulumello, *Beyond Winning*, at 108.

²⁶Boulle and Kelly, at 52-3.

²⁷Roger Fisher and William Ury, *Getting to Yes: Resolving Agreement Without Giving In* (New York: Penguin Books, 1981). This is the most popular approach and has been further refined through the Harvard Negotiation Project.

The central idea is that conflict takes place in the context of shared interests. The goal of negotiation is to probe beneath the initial positional claims of the parties to uncover underlying needs and interests and then attempt to fashion creative solutions which meet as many of each parties' interests and mutual needs as possible. Although initially conflicts are seen in zero-sum terms, they can almost always be converted into positive-sum ones that are subject to "win-win" outcomes.

The underlying assumption is that conflict can be understood as an unresolved problem: when human need or interest is frustrated, some form of conflict results. Conflict thus arises when attainment of the interests or satisfaction of needs of one party is found to be incompatible with the attainment of interests or satisfaction of needs of another party. The theory is that the opposition created by competing interests hardens into positions around which polarization occurs.²⁸ The focus is on shifting from a negotiation based on these hardened positions to one that addresses the underlying interests.

In the interest-based negotiation model, the process is seen as a collaborative one in which the parties engage in joint problem-solving in order to develop a solution that meets the interests of all parties. The objective is to produce mutual satisfaction.

The process entails talking about interests, recognizing the others side's interests and discussing legal options and risks. This approach is based on human capacity for "enlightened self-interest" and the recognition and satisfaction of mutual needs. It encompasses an understanding of human behaviour that is more nuanced and sophisticated than the simple definition of self-interested motivation privileged in positional bargaining.

However, the underlying premises of this approach date further back. For example, the idea of "integrative bargaining" and related concepts developed from a socio-psychological perspective by Pruitt and his colleagues have much in common with the problem-solving approach. See: Dean Pruitt, *Negotiation Behaviour* (New York, Academic Press, 1981).

²⁸Winslade and Monk, *Narrative Mediation*, at 32.

In order to enable and support problem-solving, the negotiation process should:

- create a collaborative working relationship with the other side;
- promote the effective communication about the legal options and risks and relevant law;
- facilitate effective communication about parties' interests, resources and priorities in order to find value-creating trends;
- encourage the development of creative options;
- minimize transaction costs;
- treat distributive issues as shared problems;
- result in no harm to the relationship between the parties; and
- defend parties against exploitation.²⁹

Recently the problem-solving approach has been refined, so that the central activity is seen as "the search for value-creating trade-offs that can make one or both parties better off."³⁰ This is a response to the concern that the focus in negotiation is often more on distributing value than on creating it, even in many interest-based negotiations.³¹ Legal negotiations are seen to involve a tension between creating and distributing value. While this tension cannot be resolved, it can be minimized through problem-solving approaches.

The principles of the problem-solving approach have had a profound influence on the contemporary mediation movement. The main legal areas where facilitative mediation has been utilized are: business, personal injury, public policy, family, partnership, environmental, municipal and neighbourhood disputes.³²

²⁹Mnookin, Peppet and Tulumello, at 207.

³⁰*Id.*, at 12.

³¹*Id.*, 18.

³²Boulle and Kelly, at 33.

Within an interest-based negotiation, the third party role is referred to as facilitative mediation. Mediators help the parties to: uncover and share their interests; search for and define problems that need to be solved or addressed; and, formulate potential solutions. The mediator does not focus on individual comments or move-by-move interaction as in positional bargaining. Rather, the problem-solving approach encourages mediators to help the parties unearth underlying interests, thereby identifying the problems that these interests create. According to this model, the mediator assists with process only and remains neutral on the substance of the dispute.

As in settlement and evaluative mediation, the primary focus within facilitative mediation is on the creation and acceptance of settlement terms. However, the process of reaching settlement is quite different. Rather than taking positions as a given, the mediator is prepared to challenge the parties to rethink their positions during the process of reaching agreement. One of the ways the mediator can assist parties to reconsider their interests is by facilitating the development of principles or objective criteria to guide the outcome of the negotiation process. This is often conceived as going beyond "narrow legal remedies." Alternative sources for these criteria include: market values, an expert opinion, standards in comparative industries, or common understandings in commerce.

In summary, in a problem-solving process, the mediator's main role is to conduct the process, maintain a constructive dialogue between the parties and enhance the negotiation process. There is a relatively low intervention role for the mediator as parties are encouraged to fashion creative outcomes around mutual interests.

There are a number of advantages to the problem-solving approach in comparison to positional bargaining. First, by focusing on all of the underlying interests, it has the potential to deal with the all aspects of the conflict. It serves to move the dispute beyond single issues to multiple issues and can take into consideration future interests. This changes the nature of the negotiation by putting more resources on the table or "increasing the pie" rather than simply finding a way to "divide" it.

This form of negotiation and mediation is also more open to the parties' psychological and procedural needs and interests and attempts to accommodate them. For example, it provides different informational sharing processes which make room for parties to openly present their interests and views rather than simply shaping them into a hardened position. It can also assist in the preservation of relationships by acknowledging and dealing with emotional and interpersonal dimensions of conflict and taking into account future relations between the parties.

The problem-solving approach also has important benefits in terms of the search for solutions and the nature of the settlement achieved. It facilitates looking creatively at a range of options and negotiating on the basis of principles.³³ Parties are encouraged to engage in a conversation about the fairness and justice of solutions. The process provides legitimate standards in the form of objective criteria for evaluating and accepting settlement options, without parties appearing to capitulate or unduly compromise their interests.³⁴

Most of the shortcomings attributed to the problem-solving model relate to the difficulty in implementing this approach, rather than to its basic premises. Problem-solving makes many more demands on the parties by comparison with positional bargaining:

These alternative approaches to negotiation have a number of pre-requisites which are not present in positional bargaining. The parties must share information, be reliable and honest with each other, attempt to understand and accommodate each other's interests, engage in constructive communication and otherwise display a cooperative attitude. They also assume some skills in creative problem-solving. In deep-seated conflicts they require the parties to change from a bargaining to an analytical approach, to commit themselves to a wide exploration of possibilities and to accept outside facilitation.³⁵

³³R. Fisher, *International Mediation: A Working Guide* (International Peace Academy, 1978); Fisher and Ury, *Getting to Yes*; Pruitt, *Negotiation Behaviour*; C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving," (1984) 31 *UCLA L. Rev.* 754.

³⁴Boulle and Kelly, at 56.

³⁵*Id.*, at 54.

Parties must be willing and able to negotiate creatively and fairly and to focus in good faith on developing joint solutions. This overlooks the fact that some parties have ulterior motives for taking part in negotiations, for example, to exact revenge, to discover information, or for the thrill of competitive confrontation, and would have little incentive to take account of the other's sides interests.³⁶

The ideal of problem-solving negotiation is seen to be naive because it is unable to counteract the fact that distributive adversarial approaches continue to dominate most interactions. From this perspective, regardless of the process, the more powerful party will be able to prevail through crude positional bargaining. At the end of the day, limited resources mean that there will be winners and losers. In addition, objective criteria may be elusive: parties may have competing standards of what is fair or objective; and/or expert or legal opinions may be in conflict and may themselves contribute to the difficulties of achieving resolution.³⁷

Supporters of the problem-solving approach respond that one of the ways to overcome some of these obstacles is through skilled mediation. Mediators can play an important role in ensuring fairness, equalizing power between the parties and assisting parties in the creative task of developing principles and solutions. However, this more proactive mediation role is at odds with current understandings of mediator neutrality.

In addition, from a justice system perspective, facilitative mediation is sometimes considered problematic because it requires a lot of preparation and mediators with substantial procedural expertise. It may not reach an outcome and can be a lengthy process.

There has been much discussion and debate about why the problem-solving approach has not made as much headway within the legal system as expected. Mediation processes continue to reflect

³⁶*Id.*, at 56.

³⁷*Ibid.*

values and structures of the adversarial litigation process. The predominant model cannot be replaced simply through the positing of an alternative process. Even conscious attempts to change legal culture and the attitudes and behaviours of practitioners through education are insufficient. Structural change is required. There is a need "to align incentives with the problem-solving approach through the structural re-engineering of basic rules of play at work in a given legal context."³⁸

These two models should not be seen as two separate dispute resolution tracks. One of the functions of a mediator is to assist the parties to develop an appropriate negotiation approach for their particular circumstance. This may be positional bargaining or the problem-solving approach. The two models of mediation are not even fully independent. They are "paradigm models" which are not distinct alternatives to one another and do not conform exactly to types of mediation practice.³⁹ Mediation in practice might display features of two or more models. For example, a mediation may commence in the facilitative mode but later follow a more evaluative model. The facilitative mediation model is often seen as the "pure type", however in practice, the positional approaches influence and compete with facilitative mediation.

Moreover, research has shown that mediators tend to consult a "repertoire of case patterns they know" that allows them to make a "quick cognitive evaluation of the potential outcome of a case."⁴⁰ In both, positional and problem-solving approaches, mediations make implicit or explicit judgments about how issues should be framed, which settlement terms are preferable, or which interests need to be addressed.⁴¹ Thus the models are further blurred in practice. This point is underscored in the following discussion on mediation in the context of the human rights complaints process.

³⁸Mnookin, Peppet, Tulumello, at 320.

³⁹Boulle and Kelly, at 31.

⁴⁰D. Shapiro, R. Drieghe and J. Brett, "Mediator behaviour and the outcome of mediation" (1985) 4 *Journal of Social Issues* 101, at 112.

⁴¹Folger and Bush at 4 - cite to various articles.

B. Human Rights Mediation

(i) Mediation Policy

All Canadian human rights statutes require the commissions to "endeavour to effect a settlement." While this requirement is not generally mandatory, under New Brunswick, Nova Scotia and Saskatchewan legislation, the attempt to settle the matter is obligatory.⁴² Over the last decade, there has been a renewed interest and emphasis on informal techniques of dispute resolution on the part of human rights commissions and tribunals.⁴³ This resurgence can be attributed, at least in part, to the imperatives of increasing efficiency in the context of limited financial resources. It was spurred on by delays and backlogs created during a period when there was an upsurge in the number of human rights complaints.⁴⁴

The predominant settlement practice employed by the commissions is conciliation. Conciliation practices mainly entail settlement discussions assisted by a commission official through a shuttle model usually by telephone, in which the parties do not meet face to face. Most often this occurs after the investigation process has been initiated. However, some commissions also practice pre-investigation early settlement procedures.⁴⁵

⁴²*Human Rights Code*, R.S.N.B. 1973, c. H-11, ss.17 and 18; *Human Rights Act*, R.S.N.S. 1989, c.214, s.29; *Saskatchewan Human Rights Code*, S.S. 1979, c.S-24, s.27.

⁴³The discussion in this section focuses for the most part on the mediation policies and practices in the commissions. Mediation at the tribunal level is likely to be quite different given the fact that it occurs at a later stage of the dispute. In particular, it is expected that more evaluative models of mediation would be employed. The Interim Mediation Policy of the BC Human Rights Tribunal states that "mediation offers an opportunity for those involved to resolve the complaint informally and privately, without a formal and public hearing and without "winners" or "losers". However, the primary focus on settlement is made clear in other aspects of the policy. For example, one of the factors for the appropriateness of Tribunal mediation is "there is a real likelihood that the complaint can be resolved through mediation".

⁴⁴Howe and Johnson, *Restraining Equality*.

⁴⁵For example, the Canadian Human Rights Commission carried out pre-investigation mediation on a trial basis in late 1998. See Canadian Human Rights Commission Mediation Project, *Systems Design Team Initial Report* (July 1999).

The range of settlement practices has recently been expanded to include mediation. The approaches taken by the human rights commissions in Ontario and Saskatchewan are described here based on written materials produced by the commissions. The purpose of this discussion is to provide a general overview of commission mediation policies.

The Ontario Human Rights Commission (OHRC) has instituted what is seen as a "phenomenally successful" mediation process.⁴⁶ During the first six months of this mediation initiative, there was an 80% settlement rate. Over 2/3 of parties were voluntarily opting for the process within 90 days of filing the complaint.

The OHRC describes its mediation process in the following way. The mediation service is a neutral one, participation is voluntary and it is provided at no cost to the parties. Mediation services are offered only after a formal complaint has been filed. The mediation process is not an investigative or inquiry procedure. Rather, it gives both sides to a complaint the opportunity to check their facts and assumptions, as well as exchange perceptions and ideas. Most of the mediations involve face to face sessions. The mediation sessions are confidential and off the record. No part of the mediation is reported nor forms part of the file if mediation fails.

Parties are directly involved as the participants and have the opportunity to work towards a mutually agreeable settlement. Parties involved in a complaint are not prohibited from being assisted during the mediation by a lawyer, representative or any other person. However, these persons, while present, do not necessarily participate actively in the process.

The guidelines for mediators permits them to provide information to the parties regarding the kinds of remedies the OHRC is looking for and directs them to address any public interest component of the claim.

⁴⁶Norm Fera, "Mediation in Human Rights Complaints", *Lawyer's Weekly National Edition* ADR Focus Section (Summer 1998).

During the mediation process, there is no pressure to settle or admit liability. If a settlement is reached, it is signed by all parties and is subject to approval by the OHRC. The OHRC must approve or reject the settlement within 48 hours. Once a complaint is settled all issues are closed. The settlement is a legally binding contract and must not be publicized unless the parties consent. If no settlement is reached then the complaint is transferred to a commissioner officer for investigation without delay.

After one year of operation, the OHRC began to evaluate participant satisfaction in mediation. All participants in the mediation process, including the parties, their representatives and the mediators were surveyed and the results have been reported.⁴⁷ During the period covered in this report, 72% of mediated cases (144 out of 201) were settled.⁴⁸ The median time to settlement for these cases was 4.6 months. About 36% of complainants and 31% of respondents were unrepresented during the mediation. However, complainants were represented by lawyers only 33% of the time,⁴⁹ while respondents were represented by counsel in 65% of cases.

The results indicate that participants are quite satisfied with the OHRC's mediation service. The research findings indicate a strong correlation between settlement and satisfaction scores.⁵⁰ However, one note of caution is that complainant parties and respondent parties differed significantly

⁴⁷Ontario Human Rights Commission, *Mediation Services Participant Satisfaction Report - For the Period May 8, 1998 to September 22, 1998*.

⁴⁸No statistics were provided on how this number relates to the total number of complaints during this period.

⁴⁹25% of the time by family members or friends and 5% by union representatives.

⁵⁰*Mediation Services Participant Satisfaction Report*, at 29. The main findings were:

- 74% of participants reported overall satisfaction with the process;
- 63% reported overall satisfaction with the mediation outcome;
- 78% felt or felt strongly that they had been treated as equal participants;
- 89% indicated that the process and the officer's role in it were adequately explained;
- 70% indicated that the issues were sufficiently explored;
- 85% indicated that the mediation officer was fair and acted in a neutral manner;
- 74% indicated that their concerns were heard; and
- 69% indicated that their rights (or their client's rights) were addressed through the mediation process.

in terms of their general satisfaction with the mediation process. The findings indicate that 78% of respondent representatives and only 57% of complainant representatives were satisfied or very satisfied with the mediation process. This result might be attributable to the fact that respondents had greater access to legal representation.⁵¹

The Saskatchewan Human Rights Commission (SHRC) has developed a mediation initiative that focuses on both efficiency and qualitative goals:

One of the greatest challenges for human rights agencies today is to develop a complaint system that not only processes complaints efficiently but also enables the parties to develop mutual understanding and mutually acceptable solutions.⁵²

Since 1993, the SHRC has been engaged in the development of early resolution processes that provide alternatives to the investigation of complaints. Previously virtually all complaints went through a full investigation before being either dismissed or forwarded to a staff solicitor for settlement efforts because the investigation indicated a violation of the *Saskatchewan Human Rights Code*. This process was inevitably adversarial with the parties quickly becoming locked into their positions. The process was also very time consuming.

The SHRC began offering early resolution (ER) in March 1994 inviting parties to attempt ER at any point in the investigation or even before an investigation was begun. ER mostly involves telephone shuttle negotiation due to lack of resources. This approach successfully resolved about half of those complaints in which it was tried. The process was effective in every type of complaint received by the SHRC and was more successful than investigation at reintegrating complainants into the workplace.

⁵¹The survey concluded that further research is needed to determine whether this is a causal factor.

⁵²*Saskatchewan Human Rights Commission, Human Rights, Human Remedies* (Saskatoon: Saskatchewan Human Rights Commission, 1998) at 1.

After intensive mediation training of its staff, the SHRC began to offer face to face mediation in every case, as long as preliminary screening showed that this would be appropriate. At present, the SHRC offers complainants and respondents a variety of techniques for resolving complaints. At any point before an investigation concludes, parties can chose to attempt early resolution. Within ER, the options include face to face mediation, shuttle negotiation, or some combination of the two. Whatever form early resolution may take, in the Saskatchewan process it is always voluntary and interest-based. Early resolution is also confidential and it is kept separate from the investigative process.

The majority of reform reports dealing with the human rights complaints process have recommended an increased use of alternative options, and particularly mediation.⁵³ However, these recommendations remain at a fairly general level and do not provide guidance on the qualitative nature of the mediation process that is envisioned. The common features of these recommendations are an emphasis on early and voluntary processes. Issues such as power imbalances, protection of the public interest and so on are to be dealt with through commission guidelines. Most reports do emphasize the need for a mediator to be substantively knowledgeable about human rights.⁵⁴ Different approaches are suggested with respect to confidentiality, reporting and/or approval of settlements by the commission.

(ii) Mediation Practice Observed

During the course of conducting this study, I had the opportunity to engage in ongoing discussions with members of a mediation practice group in the Vancouver office of the British Columbia Human

⁵³See *CHRA Review Panel Report*, recommendations 61, 88-96, at 67, 79-83; *the Cornish Report* recommendation 30-31, at 116-119; *the Black Report*, recommendations 3-C-39-44, at 113-120.

⁵⁴For example the *Cornish Report* recommended that "persons providing mediation services should:

- be knowledgeable about and supportive of the principles and purpose of the Code;
- guide the parties to reach a settlement which complies with the Code;
- be aware of and sensitive to power imbalances between the parties in the case;
- be respectful towards persons who experience discrimination. (Recommendation 31 at 119).

Rights Commission (BCHRC) and to observe a number of mediations conducted by these officers.⁵⁵ The following account is based on reflections on the mediation process which emerged during these discussions and through the observation process. Given the limited nature of this experience, this account does not draw any conclusions about the nature of potential of mediation nor does it in any way purport to assess mediation practice at the BCHRC. Rather, it is set out with the more modest objective of providing additional empirical insight into current mediation practices in the human rights setting.

The reflections on the nature of mediation practice developed in this process provide the following images. Mediation is seen foremost as an "opportunity to explore interpersonal relations and look at problems in a non-legal way."⁵⁶ It is a chance for parties to give their perspective and have it heard. It is "not about legal process" rather it is primarily about "information exchange". Put another way it is "about people not about precedent." The main approach is described in terms that best fit the interest-based approach and facilitative mediation model. In the experience of these mediators,⁵⁷ the general view expressed is that "the earlier it is in the process, the more human and the less legal" the process tends to be.

One of the concerns identified by this group of mediators is the problem of conflicting imperatives in carrying out the mediation function. They have a duty to assist the parties to reach a settlement but they also have an overarching duty to promote the purposes of the *Human Rights Code*. This conflict is often expressed in terms of concerns over their responsibility to remain neutral in the process. In general, the mediators feel that they only had a role in educating the parties as to existing

⁵⁵I would like to thank all of the members of this practice group and particularly Peter Threlfall, the convenor of the group, for their willingness to share their views with me and allow me to observe their work. I would also like to thank the parties to the mediation for permitting me to observe their sessions and Tom Beasley, Chris Finding and Mary-Woo Sims for facilitating my research at the BCHRC.

⁵⁶All of the quotes in this section are based on the detailed notes made during the course of my research. As per my research agreement with the Commission they are reproduced in a non-attribution basis.

⁵⁷At the BCHRC, mediation is carried out by Human Rights Officers. I use the term mediators here to distinguish this specific role from the other functions that these officers carry out (i.e. investigation, conciliation).

decisions made by the BC Human Rights Tribunal in similar cases. They do not believe that they have a role in shaping the substance of settlements because that would offend the process by infringing on the self-determination of the parties.

Four mediation sessions were observed⁵⁸ and each one was in-depth and lasted for over 3 hours. Three of the four resulted in reaching settlements by the end of the mediation, while the fourth led to a further mediation session within a week. In all cases, parties were represented by legal counsel.

The mediator's first role was to explain the process and create an informal setting. She⁵⁹ suggested the use of first names. She described the process as an attempt at settlement and noted that the failure to settle would have no negative repercussions for the progress of the claim. The session was foremost an opportunity for the claimant to tell his or her story and for the respondent to do likewise. The goal was to get away from legal positions and "identify issues that are present today". The mediator acknowledged that the parties have positions, but that the goal was to get to what "needs to be resolved." She explained that this approach was selected because it opened the door to problem-solving. The session was not geared toward evaluating merits, rather it was an arena within which the parties could talk. One of the main functions was to facilitate the exchange of information, since information is key to resolution. The mediator recognized that what was said might be contentious but she encouraged parties to listen. Ground rules for listening and taking turns were established.

The mediator also spent some time clarifying her role. She specified that this was to facilitate settlement, and not give advice. However, she was able to give information to both sides in a

⁵⁸While this number is quite low, it is comparable to the number of mediations observed in other qualitative studies into the nature of the mediation process. For example, Jonathan Shailor bases his work on three case studies in *Empowerment in Dispute Mediation: A Critical Analysis of Communication* (Westport: Praeger, 1994).

⁵⁹The female pronoun is used throughout this section for the sake of simplicity despite the fact that I observed both women and men in this role and that there were co-mediators in two of these sessions. Similarly, the singular female pronoun is used to describe the parties regardless of the actual sex or number of the individuals involved.

balanced way. Her main task was to keep lines of communication open. Quite a bit of time was spent on underscoring the impartial nature of this role.

During the course of the mediation sessions, the mediator did play a role in "interpreting" the parties' words and thereby facilitating understanding. She was well-prepared and was able to ensure that all of the issues were on table. She kept the process moving and repeatedly stopped parties from getting stuck. The mediator also had a strong role in suggesting terms for the agreement and she always took responsibility for drafting the agreement for review and approval by the parties.

In all cases, the claimant had the opportunity to discuss the impact of the alleged discrimination, often in emotional terms. The respondent did not reciprocate at this level. In one case, there was a direct rapprochement between complainant and the respondent, where the former clearly felt that she had been heard and understood. In another case, there were substantial discussions aimed at finding creative solutions to accommodate the interests of the parties. However, for the most part the issues were cast in monetary terms and so the process moved relatively quickly from the initial problem-solving to facilitated bargaining through private caucuses.

With the exception of the complaint's initial comments, there was very little discussion of the human rights legislation or equality and discrimination norms and concepts during the mediation.⁶⁰ In one instance, the respondent vehemently did not accept the fact that her actions violated the *Code*, in a situation where there was a clear breach on the face of the facts discussed in the mediation. In this case, like in the others there was little or no acceptance of responsibility for any harm caused. The emphasis was exclusively on settlement. The discussions on damages did refer to existing Tribunal decisions and practice.

The potential of a broader policy response in addition to the individual settlement was raised by the mediator in two cases. However, these foundered very quickly as neither party expressed interest

⁶⁰Although the mediator had clearly discussed with the parties the *Code's* provisions as they applied to the complaint in conversations with them leading up to the session.

in pursuing this line of negotiation. In fact in one of the sessions, the lawyer for a complainant stated her view that "mediation processes are not suited to this type of discussion."

The mediation process observed in this small set of complaints can be understood as kind of a hybrid of problem-solving, settlement and evaluative approaches to mediation. Perhaps in keeping with the fact that these were serious but routine complaints, there was no real engagement on substantive normative issues. The focus was almost exclusively on whether or not settlement was possible and if so on what terms. Opportunities to explore human rights norms raised by the mediator were not taken up. Quite to the contrary, they were quickly discounted.

C. Reconsidering Models of Mediation

The models of mediation currently integrated into the human rights complaints process are limited. The problem-solving/facilitative mediation approach posits itself as an alternative to, and advance over, the positional bargaining approach that underlies settlement and evaluative mediation. While problem-solving is clearly a preferable approach, it operates within the same cultural framework as positional bargaining and hence its potential is circumscribed. The limitations on the problem-solving approach are exacerbated in practice, unless there is a conscious effort to cultivate the values that underlie it.⁶¹

More fundamentally, even where adversarialism can be avoided through conscious effort, problem-solving is limited because its premise is individualistic. The focus is on the individual and the view that individuals are driven primarily by internally generated needs, with their origin in human nature

⁶¹Menkel-Meadow, "Pursuing Settlements". For other discussions on the role of legal culture see L.Riskin, "Mediation and Lawyers" (1982) 43 *Ohio State Law Journal* 29. A US study into the limited impact of ADR in US federal court pilot projects noted that despite the explosion of the ADR industry, few lawyers actually practice mediation. (Deborah Hensler, "Puzzling Over ADR: Drawing Meaning from the RAND Report" (1997) *Dispute Resolution Magazine* 7, at 8. Riskin has related this reluctance to three factors: the way most lawyers, as lawyers, look at the world; the economics and structure of contemporary law practice; and the lack of training in mediation for lawyers. Although, this latter point is changing as dispute resolution courses gain a greater foothold in law school curriculum. Menkel-Meadow notes that these tendencies are reinforced by codes of ethics and professional responsibility which underscore traditional methods of advocacy (at 1913).

rather than cultural patterns of thinking.⁶² Conflict is seen to arise when individual needs are not being met (with needs referred to as interests in mediation). This basic premise is the same one that underlies the distributive thinking of the positional bargaining model. Parties' needs are seen as material and unchanging. Whether these needs are treated as "interests" or "positions" is not substantially different.

The problem-solving approach is seen to have the potential to redefine the conflict. Some would go further and suggest that negotiations aided by a facilitative mediator can extend to "transforming" the conflict.⁶³ The nature of this "transformation" has been described in this way. Parties often define their dispute or conflict in very simple terms at the outset. Further investigation may uncover other related issues. Mediation provides an opportunity for the "problem" to be defined in terms of all its factors before options for settlement are considered. Thus, the problem has been "transformed".

One example used to illustrate this point is that of a landlord and tenant dispute that is initially defined as an issue of non-payment of rent by the former and an issue of the landlord's breach of the requirement to keep the flat habitable by the latter. Several other issues could be revealed through the mediation process, for example, aggressive behaviour by the landlord towards the tenant's guests, the tenant's public attacks on the landlord's reputation, contrasting views on appropriate levels of noise, and the confrontational way in which lawyers intervened in previous disputes between the two.⁶⁴ A mediation process which contextualizes the dispute in this way clearly has a greater potential to develop appropriate outcomes. However, this process is not transformative in the sense understood in this study. It does not extend to a redefinition of the parties' underlying interests in light of human rights norms.

⁶²Joseph Folger and Robert Baruch Bush, "Ideology, Orientations to Conflict and Mediation Discourse" in *New Directions in Mediation: Communicative Research and Perspectives* ed. Joseph Folger and Tricia Jones (Thousand Oaks, CA: Sage Publications, 1994) 3-25.

⁶³Boulle and Kelly, at 49.

⁶⁴*Ibid.*

These limitations are further underscored by the insufficient attention paid to power, rights, norms and relationships in the two mediation models. The positional bargaining approach accepts the power and rights framework as a given. Settlements reflect the relative power positions of the parties, including the power that is derived from the parties' relative legal endowments. This is made even more clear in the evaluative mediation style.

The problem-solving approach tries to avoid the application of rights norms within a power framework by focusing on interests as the shaping force within a negotiation.⁶⁵ However, even some of the foremost proponents of the problem-solving approach realize that the focus on interests will not eliminate the influence of power and rights.⁶⁶ Interests are always constituted within the context of power and rights, and resolution of difference will always rely upon the balance of power and rights for some component of the resolution framework. From the problem-solving perspective, the goal is simply to minimize the power and rights-based means for resolving disputes and maximize those based on interests.

In both of these models of mediation, power and rights continue to shape the process and outcome of the settlement process in an unreflected way. Additionally, disputes are dealt with in isolation without focussing on the relational setting in which conflict takes place. While problem-solving tries to focus on joint issues and collaboration, this is a superficial approach that does not emphasize the complex web of relationships intrinsic to human interactions. The focus on individual needs directs attention away from the cultural, collective or relational aspects of personhood.⁶⁷ This is problematic because it ignores the values of justice and equality which are just as important as individual satisfaction in the fulfillment of needs.⁶⁸ One practical concern arising from this limitation is that

⁶⁵In the Harvard Negotiation Project Model, power, rights and interests are all seen as discrete factors operating through distinct processes. See W.Ury, J.Brett, and S. Goldberg, *Getting Disputes Resolved* (San Francisco: Jossey-Bass, 1988).

⁶⁶Mnookin, Peppet, Tulumello, *Beyond Winning*.

⁶⁷Winslade and Monk, at 33.

⁶⁸Folger and Bush, "Ideology, Orientations to Conflict and Mediation Discourse," at 14.

the mediator's role remains fairly constrained. There is a tendency to drop issues that cannot be treated as problems, because they are inconsistent with individual interests as conceived prior to the mediation.⁶⁹ However, it is more accurate to define interests in relational rather than individualist terms because human nature and need is shaped by social interaction.

The role of rights norms within mediation is also narrowly conceived in the two models of mediation. This dynamic is seen solely in terms of the congruence between a given settlement and existing legally-established rights and likely legal outcomes.

There is no room for deliberation on the need for a different interpretation of human rights norms. The questions of whether mediation could, and perhaps should, be a process that leads to very different results than adjudication, are never posed.

The continuing focus on "problems" means that the problem-solving approach maintains the focus on disputes. It perpetuates the hold of the current conflict paradigm. This approach is sufficient to deal with an issue that is in effect a problem or a dispute. However, human rights issues amount to more than this. The vindication of human rights requires a questioning of underlying norms and paying attention to the broader context and to structural inequalities. Furthermore, the premise that private models of dispute resolution are directly applicable is highly questionable given the inherently public nature of human rights vindication. The focus should not be on extending the reach of these private law models, but rather on developing public models to achieve this purpose.

This reconsideration of the two existing legal mediation models leads to questions about what steps need to be taken to develop an alternative model. In the context of this study, the goal is the development of transformative public conflict resolution model and related mediation practices that contribute to achieving social justice. A number of elements of this model are apparent at this point.

First, the development of a transformative model of mediation requires substituting the dispute

⁶⁹*Id.*, at 12.

resolution approach with a conflict resolution one. Mediation models and practice are shaped by orientation to underlying view of conflict. Views of conflict are matched by views of what criteria should operate as a determinant of the conflict resolution process. Dispute resolution accepts the existing context and work to resolve a conflict within that framework, but conflict resolution goes further by challenging the context itself.

Conflict resolution can be defined in a dynamic way by recognizing that it is a term that applies of a state of affairs, outcome and process. Conflict resolution characterizes a state of affairs in which the attitudes, behaviour and goals of the relevant parties are perceived to be compatible. It is an outcome which is an agreement accepted by all the relevant parties about the way in which their relationship is to be conducted in a cooperative manner. Conflict situations still arise, however, the definition of the problem and the tools which are necessary to resolve it are provided by the relationship itself, which is therefore self-sustaining. The process of conflict resolution is the course by which conflict processes are maintained and carried through to a beneficial conclusion, while the dysfunctional elements are minimized or eliminated.⁷⁰

Secondly, in addition to shifting the focus from dispute to conflict, it is necessary to emphasize resolution rather than settlement. One of the problems with the current focus on settlement as the only goal of a mediation process. Settlement is the undisputed priority of all mediation programs integrated into legal institutions. Settlement is important but this exceedingly narrow focus obfuscates the potential of mediation. Resolution deals with underlying causes of conflict, not simply outward manifestations. It entails that the parties accept the outcome because it meets their requirements in a fundamental sense, not merely because it is the best they could achieve or because it was imposed by an outside force. Although not every case can reach resolution, by making resolution the primary focus every case can be an occasion for reflective learning.⁷¹

⁷⁰This is the definition that I developed in my Masters thesis. Melina Buckley, *The Radical Implications of Conflict Resolution: Resolving Self-Determination Conflict Without Violence* (unpublished Masters thesis, Carleton University, 1988).

⁷¹Kressel, at 539.

Thirdly, the process of conflict resolution must integrate a recognition of the transformative dynamic of conflict. Conflict by definition is a phenomenon that transforms events, the relationship in which conflict occurs, patterns of communication, expression and perception, and indeed all those involved.⁷² Left unchecked the transformative nature of conflict can result in destruction or can be they can be repressed through conflict management, However, transformative models of conflict resolution are ones that build on this creative aspect of conflict to magnify the ways in which conflict becomes a transforming agent for positive systemic change.

Existing understandings of the potential of mediation in the legal context continue to be severely circumscribed by the continuing hold of the adversarial, self-interested model of human behaviour and the emphasis on settlement of disputes. Mediation has a potential that extends far beyond its current conception. An appreciation of this potential is expanded through a review of alternative approaches. The transformative public conflict resolution approach is discussed in the next section with a view to enlarging our sense of the potential of mediation in the human rights context.

4.3 Transformative Public Conflict Resolution

A. Philosophy and Principles

The transformative public conflict resolution approach⁷³ shares the same underlying philosophy that informs the work of communicative democracy theorists discussed in the previous chapter.⁷⁴ These

⁷²Lederach at 17-19.

⁷³Dukes uses the term transformative public conflict resolution in his work. My use of this term shares some of the characteristics of his approach but is not identical.

⁷⁴These two schools are both linked to a related developments in many disciplines, including Carol Gilligan's work in moral theory and psychology and other approaches in sociology, history, political science and philosophy, particularly scholars who seem themselves as "new republicans" or as "communitarian" or "dialogist" theorists. See discussion in Folger and Bush, "Ideological Orientations" in endnote 7 at 25.

varied works provide a radically different view of society and human interaction. In particular, they challenge status quo thinking of self-interest and materialism as the defining characteristics of human motivation and competition through power processes as the defining form of interaction both at an individual and communal level. They assert the potential of communication and relationships in a fundamental way.

A central aspect of this philosophic orientation is social constructivism. This orientation is based on the premise that ideas, thoughts feelings and experiences are constructed out of the available discourse that circulates in the communities in which we live. This approach entails a much more fluid view of "reality": social life is not a given, it is what we make of it. For example, it means that ideas formed out of an individualistic, needs-based discourse constitute only one way of viewing, judging and making sense of the world.⁷⁵ Social constructivism gives rise to four principles that frame a conflict resolution process. These principles are: anti-essentialism; anti-realism; language as a precondition of thought; and language as a form of social action.⁷⁶

Anti-essentialism is the view that people are more products of social processes than determined from the inside. Human nature is fluid, not set. People's needs are not essential or natural, rather they are constructed in discourse and therefore a different kind of conversation might potentially lead to a revision of those needs.⁷⁷ This perspective shifts the purpose of conflict resolution beyond the task of need fulfilment (in which needs to be fulfilled are taken as given) and in the direction of transformation.⁷⁸

⁷⁵Winslade and Monk, at 35.

⁷⁶*Ibid.*

⁷⁷Others prefer to avoid the essentialism/anti-essentialism dichotomy by focusing on the fact that needs are developed within a social context. See for example Mary Clark, *Ariadne's Thread: the search for new ways of thinking* (New York: St.Martin's Press, 1989).

⁷⁸Winslade and Monk, at 38.

Anti-realism questions the existence of objective facts. Rather, knowledge is conceived as being derived from a perspective shaped by particular cultural or social versions of reality. As a result, coming to know the truth about an issue is as much about coming to understand the perspective from which the issue appears in a certain way, as it is about understanding the specific aspects of the issue. All facts serve particular interests because facts are always perceived from a particular perspective. Facts can be seen to be "established" or "accepted" when a perspective on them is shared by more than one person or where that perspective is privileged within society.

Anti-realism suggests that the mediator's role is not just to help sort out or establish facts but to deconstruct the perspectives from which such "facts" have been established and to appreciate the interests served by those perspectives.⁷⁹ In a transformative mediation process, all of these things become more fluid. The mediator is not just interested in hearing the facts and establishing parties' interests but also in the cultural and historical processes by which these facts and interests came to be.

Given that reality does not have an independent existence, the way we communicate about the world around us takes on great importance. Language is central to the transformative public conflict resolution school in two ways.

First, language is seen as a precondition for thought. Words are not a simple vehicle, they construct the event. Language has a "constitutive function" in that it produces human experience.⁸⁰ Language is a meaning-making activity that has a function of permitting or constraining the options that might be available to us. The "talk" that is created through a conflict resolution process is seen as actually constructing experience.

⁷⁹*Ibid.*

⁸⁰This is the insight developed foremost in the work of Michel Foucault. See discussion in Fairclough, *Discourse and Social Change*, at 37-61.

Secondly, language is also seen as a form of social action. The world is constructed through interaction and language is "performative" in the sense that when people talk they are not only expressing what lies within, but they are also producing their own world.⁸¹ Language is not simply a passive vehicle for description, but an active vehicle of creation.

This means that like in other discourses, mediation is a site where social action is always taking place rather than just being talked about: "It is where lives and relations are being produced and reproduced. It is where cultural stories are performed and enacted. It is also where social or institutional changes can take place."⁸²

The philosophy of social constructivism helps to explain how and why conflict resolution has so much transformative potential. It focuses on the inherent fluidity of human interaction. From this perspective conflict is a positive force because it provides an opportunity to recognize and address underlying structures of inequality that inform the status quo. Conflict is therefore welcomed rather than suppressed.

Conflict is the almost inevitable by-product of this diversity of meaning and different perspectives.⁸³ It is also seen as a product of the operation of power in the modern world conceived as contests over whose meaning gets to be privileged. These contests are central to the ongoing creation of the social world, a process which is never finalized. As an example, divorce mediation can be seen as a key site for the production and reproduction of power relations between men and women.

One of the practical ways in which the transformative conflict resolution approach is different from dispute resolution is that the focus shifts from interests to entitlements to explain how conflicts are produced. Neither human needs nor interests are seen as inherent and pre-existing. There are clearly

⁸¹Winslade and Monk, at 40.

⁸²*Ibid.*

⁸³*Id.*, at 41.

biological bases for human needs, such as food and protection from a hostile physical environment. However views on how these needs can and should be fulfilled are contextual and subject to change. Furthermore, the majority of people's psychological, social and emotional human needs are constructed within the socio-political landscape.⁸⁴

We suggest that human need is discursively constructed. There is something about the dominant description of need that appears non-negotiable and taken-for-granted. It invites us to accept that need must be catered to because everyone has it. However, we find it more useful to work with the concept of entitlement rather than need. Entitlements lend themselves more readily to close scrutiny, debate and challenge. When we talk about an individual having a need, there is less opportunity to examine the nature and legitimacy of that need because it is seen as pre-existing. Entitlement, conversely, is seen as linked with an intention or a desire that has been constructed.⁸⁵

Transformative public conflict resolution processes can therefore be viewed as addressing the contest over different notions of entitlement rather than as a process that sets out to meet people's needs or interests. This further underscores the potential for transformation. Conflict is by definition transformative:

If we define conflict as incompatibility - of ideas, behaviours, roles, needs, desires, values and so on - then resolving such incompatibility leads in some way, to change: in attitude, perception, belief, norms, behaviour, roles, relationship, and so forth.⁸⁶

The transformative public conflict resolution approach entails a less instrumental view of the resolution process. This process is aimed as much at changing the way people relate to each other and to society and to how institutions and structures work, as it is with accomplishing the resolution of a specific dispute. As such, it shares much with the definition of transformative human rights practices developed in this paper.

⁸⁴*Id.*, at 96.

⁸⁵*Ibid.*

⁸⁶Marcus, "Change Processes and Conflict", at 366.

The goal is not problem-solving, but transformation. In some of these approaches transformation is described at the individual level on the two dimensions of human growth: empowerment and recognition.⁸⁷ However, transformation can also be seen on a systemic level in terms of identifying and responding to opportunities for social transformation leading to social justice. The transformative approach is "self-consciously educative."

Conflict resolution is participatory in nature because it draws in the parties involved directly in the generation of solutions. It seeks changes in the established order and consists of mechanisms designed to bring closure to a conflict cycle.⁸⁸

This alternative approach contributes to a greater potential to develop resolutions that are outside of the traditional, fairly limited approaches to remedies under existing approaches. It goes beyond interests and deals with the underlying relationship itself. The general philosophy, principles and orientation of transformative public conflict resolution can be applied through a transformative model of mediation. The process of transformative mediation is characterized as series of communicative and relational interactions.

Communication is understood within a conceptual discourse framework where discourse is defined as the process of talk and interaction between people and the products of that interaction. It is important to keep this dual meaning in mind since "just below the surface of any conversation are a set of structuring statements about how things are, that gives meaning to the words being exchanged".⁸⁹ Discourses also give meaning to social practices, personal experience, structural arrangements and institutions. Deliberative practices within transformative mediation are geared toward revealing these structures.

⁸⁷Folger and Bush, *The Promise of Mediation*.

⁸⁸Schoeny and Warfield, at 257.

⁸⁹Winslade and Monk, at 42.

One of the basic premises of this approach is the fundamentally relational character of all social life. The world is seen to contain "both the plurality of individual selves and the (potential) unity made up of the network of their relationships."⁹⁰ Society is seen as the medium for the process of human relations. Without relationships, there is no conflict.

Relationships and interdependence contain both the genesis of conflict and the potential for resolution. The critical shift through the mediation process is from antagonism to cooperation. The whole process is given persistence and movement by the basic contradiction between the parties' conflict and their need for joint action.⁹¹ This focus underscores the need for relational practice in mediation. These practices include active listening and recognition of the other party.

B. The Practice of Transformative Mediation

The philosophy and principles of conflict resolution may appear to be very abstract and far from the legal image of conflict and related processes. However, it is an approach that has the potential to inform the development of transformative human rights practices. Transformative mediation is one specific practice that is consistent with this approach.⁹² There has been substantial practical experience with transformative mediation to date. Hence it provides a concrete context within which to further investigate the implications of this alternative approach.

Transformative mediation practices have evolved from therapeutic counselling and client-centered models. This group of mediation practices is described in a rich literature of theoretical, empirical

⁹⁰*Id.*, at 20.

⁹¹Tricia Jones, "A Dialectical Reframing of the Mediation Process" in *New Directions in Mediation*, 26-47.

⁹²Another model can be found in some of the systemic reconciliation processes, such as the Truth and Reconciliation Commission implemented in South Africa. The potential applicability of this type of model within the human rights complaints process is discussed in Chapter 5.

and practical work.⁹³ Although it has had an impact on some aspects of mediation in legal disputes, this approach has not been adequately recognized by the legal discourse on mediation to date.

This section describes current transformative mediation practices based on the central metaphor of narrative or story-telling. This metaphor is set out and explained. The narrative mediation model developed by two New Zealand practitioners and scholars, John Winslade and Gerald Monk, is presented as an example of transformative mediation practice.⁹⁴ This presentation includes a discussion of the process, the role of the mediator and mediation strategies and techniques.

A single model is presented in detail because it is the most effective way to illustrate the differences between existing mediation practices and alternative practices that operate outside of the adversarial context, even where they deal with legal disputes. Although the focus is on one model, insights from other approaches to narrative mediation are woven into this discussion.⁹⁵ Winslade and Monk's model has been selected because it has a number of features that make it particularly suitable to the human rights context. These features are highlighted in the following discussion.

⁹³In addition to the works cited in footnote 13, see: Michelle LeBaron, "Conflict Analysis and Resolution as Education" (Victoria: University of Victoria Institute of Dispute Resolution, 1996); R. Bandler and J. Grinder, *Reframing: Neuro-Linguistic Programming and the Transformation of Meaning* (Moab, Utah: Real People Press, 1982).

⁹⁴*Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Joffrey-Bass Publishers, 2000). In my opinion, this is the fullest and most helpful account of transformative mediation practices published to date. Much of the discussion in this section is based on this work.

Needless to say this model was not developed in isolation and is based on some already well-established techniques in narrative therapy including: M. White and D. Epston, *Narrative Means to Therapeutic Ends* (New York: Norton, 1991); J. Freedman and G. Combs, *Narrative Therapy: The Social Construction of Preferred Realities* (New York: Norton, 1996); V. Dickerson and J. Zimmerman, *If Problems Talked: Narrative Therapy in Action* (New York: Guilford Press, 1996); C. Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Blackwell, 1987); S. McNamee and K. Gergen, eds., *Therapy as Social Construction* (Thousand Oaks, CA: Sage, 1992).

⁹⁵ These include: Janet Rifkin, Jonathan Millen and Sara Cobb, "Toward A New Discourse for Mediation: A Critique of Neutrality" (1991) 9 *Mediation Quarterly* 151; and, Sarah Cobb, "A Narrative Perspective on Mediation: Toward the Materialization of the "Storytelling Metaphor" in *New Directions in Mediation* 48-66.

(i) The Narrative Metaphor

In models of settlement and evaluative mediation, the process is likened to bargaining and in facilitative mediation, the analogy is problem-solving. However, narrative is the metaphor for the transformative model of mediation. The process is seen in terms of story-telling and the creation of a new joint story. This approach is based on the narrative perception, that is the premise that people tend to organize their experiences in story form. From this perspective, people grow amid a multitude of competing narratives that help shape how they see themselves and others.⁹⁶ Conflict stories construct the logical, causal linkages between actors, their actions and outcomes defined as problematic. The narrative metaphor is apt because it describes a mode of thinking that is particularly suitable for helping us understand complex human intentions and interactions.

The narrative metaphor flows directly from the principles of social constructivism discussed above. Descriptions of problems are typically told in narrative terms and problem narratives have often been rehearsed and elaborated over and over again by participants in a conflict. Conflict stories are seen as "constituted" by the participants, rather than as factual or objective accounts. It is important "to concentrate on viewing stories as constructing the world rather than viewing the world as independently known and then described through stories."⁹⁷

While the focus here is on the use of narrative in the context of mediation, narrative is an important form of communication in many discourses. For example, a number of legal theorists have turned to narrative as a means of giving voice to kinds of experience which often go unheard in legal

⁹⁶Winslade and Monk, at 52.

⁹⁷*Id.*, at 3.

discussions.⁹⁸ Narrative can help those who suffer a wrongful harm or oppression but who lack the terms to express a claim of injustice within the prevailing normative discourse.

Narratives offer us a way to understand the experience of others. They help to counter pre-understandings that result in false assumptions, stereotypical thinking, and a limited view of potential resolutions. It is often the only way for people in one social segment to gain some understanding of experiences and the needs of people who are differently situated.⁹⁹ For example, a story is a much more effective way to communicate the needs of people who move in wheelchairs, than a neutral, reasoned account can be.

Narratives can serve several functions within discourse.¹⁰⁰ Foremost, they are a means to situate knowledge and communicate experience. Narratives also serve to reveal the source of values, priorities or cultural meanings. They can empower relatively disenfranchised groups to assert themselves publicly. Where people whose experience and beliefs differ so much that they do not share enough premises to engage in fruitful debate, narratives can assist in reaching an initial dialogical understanding. Because they are forms of communication that further understanding, they actually help to build shared premises upon which deliberations can then take place.

Within the narrative framework, mediation is conceived as a process of narrative development and agreement construction.¹⁰¹ The mediator facilitates the reciprocal interaction of storytelling and helps the parties to form a coherent narrative as the stories come together. The mediator does this mainly by asking the parties questions to help them develop their narratives and is therefore an active participant in the co-construction of the narrative.

⁹⁸For example, see: Kathryn Abrams, "Hearing the Call of Stories," (1991) 79 *California Law Review* 971; Thomas Ross, "Despair and Redemption in the Feminist Nomos," (1993) 69 *Indiana Law Review*. See also discussion on this point in Chapter 5, section 5.3.A.

⁹⁹Young, *Inclusion and Democracy*, at 72.

¹⁰⁰*Id.*, at 70-77.

¹⁰¹See Rifkin, Cobb and Millen for a description of this process, at 156-60.

By definition, narrative construction of conflict must focus on narrative transformation: that is, the nature of the stories that unfold is dependent on the process of the telling. The mediator must pay attention to narrative politics by recognizing that as the process unfolds some stories become dominant and others can be marginalized. The image of the outcome of this mediation process is narrative interdependence, that is, a consensually-built shared story.

The new story that leads to some form of agreement is not forged from equal parts of the various initial stories. Rather, consensus evolves through the development of a new inclusive story that is accepted by the parties.¹⁰² The mediator actively balances the process in order to ensure that less coherent stories are not dominated and marginalized. This involves regulating the story construction through a set of questions of both disputants to facilitate the development of complete, and culturally resonant narratives. Mediators must manage the construction of content.¹⁰³

With great regularity, people involved in a conflict construct the "other(s)" as responsible for the negative outcome. This has two discursive consequences: (1) the construction of the self as victim, and (2) the construction of the other as victimizer.¹⁰⁴ The interdependence of positions in conflict narratives entrenches blaming in mediation and results in adversarial relations: as each party legitimizes themselves, they delegitimise the other. Within the narrative structure, participants are seen to reproduce conflict stories as they try to transform them. The resolution of conflict requires the intervention of a third party precisely because the third party can alter the persons' discursive positions and, in the process, generate a new pattern of interaction, a new interdependence.¹⁰⁵

¹⁰²*Id.*, at 161.

¹⁰³Cobb, "A Narrative Perspective", at 60.

¹⁰⁴*Id.*, at 57.

¹⁰⁵*Id.*, at 58.

The narrative mediation approach involves adopting the philosophy of transformative conflict resolution in a conscious, reflective way. It cannot be gained simply by learning some techniques.¹⁰⁶ However, social-psychological research and mediation practice provide practical guidance for conducting narrative mediation.

(ii) The Narrative Mediation Model

a. A Three-Phase Process

Narrative mediation is characterized as "an effort to join the parties to a dispute in an alliance against the effects of the conflict."¹⁰⁷ Ideally, the alliance is negotiated early on and the conflict itself becomes the opposition. The outcome is "discursive repositioning," that is, the mediation process invites people to take up "a new position in relation to the content of the dispute."¹⁰⁸ It is a mediation process that comprises three non-linear phases: engagement; deconstructing the conflict-saturated story; and, constructing the alternative story.

The first phase is engagement in which the mediator concentrates on establishing a relationship with the conflicting parties and the parties have the opportunity to share their stories. Greetings and other forms of acknowledgement between the parties are very important and must be cultivated during this phase. The mediator's role is to ensure that parties listen and understand each other and show respect. The goal of this phase is to establish the relational context between the parties by successfully engaging them in the mediation process. The mediator develops a supportive relationship with each participant.

¹⁰⁶Winslade and Monk, at 32.

¹⁰⁷*Id.*, at 62.

¹⁰⁸*Id.*, at 69.

The second phase is deconstructing the conflict-saturated story. A conflict-saturated story is one in which the plot elements and characterizations that are selected for emphasis support the ongoing persistence of the conflict. Elements that contradict the ongoing persistence of the conflict, such as moments of agreement, cooperation, and mutual respect are usually left out of the stories that both parties tell.

In this phase, the mediator begins to work actively to separate the parties from the conflict-saturated story. It is "deconstructive" in the sense that it seeks to undermine the certainties on which the conflict feeds and invites the participants to view the plot from a different vantage point. This lays the groundwork for the construction of an alternative story. The mediator deconstructs the story through curious and persistent questioning, developing externalizing descriptions of the conflict story, and showing how the conflict oppresses both parties. The mediator deals directly with power relations during this phase.

Narratives are often presented as "totalizing descriptions", that is they sum up a complex situation in one description that purports to give a total picture of the situation or of a person in it.¹⁰⁹ The mediator's task is to destabilise the totalizing descriptions of the conflict so as to undermine the negative motivations that the conflicted parties ascribe to each other. Destabilisation creates space for alternate stories to develop. Deconstruction often leads to more preferred options becoming available to the parties.

The third phase is constructing the alternative story, that is, "crafting alternative, more preferred story lines with people who were previously captured by a conflict-saturated relationship."¹¹⁰ This may lead to resolution in the form of an agreement between the parties, however, this is not assumed to be the best outcome. From the perspective of transformative mediation, sometimes the development of a cooperative attitude and respect is more important than substantive agreement. Once a degree

¹⁰⁹*Id.*, at 5.

¹¹⁰*Id.*, at 82.

of goodwill and respect are created and the relational aspects of conflict dealt with, then a more straightforward problem-solving mediation approach may be sufficient.¹¹¹ This requires that the reconstructed story addresses the power relations between the parties. Reconstruction begins with the co-authoring of a preference for a different and conflict-free description of their relationship and entails finding elements in the existing relationship that contribute to an alternative story.

In mediation, there are likely to be a series of stories at work at different levels:

- conflicting stories of the dispute each party brings;
- support persons, including lawyers, have their own version;
- unfolding story of mediation itself;
- background stories that shape meanings (larger stories of relationship, familial stories, cultural stories, or fictional accounts derived from books and movies).¹¹²

Seen in these terms, the task of mediation can be considered "to be a teasing out of these stories in order to open up possibilities for alternative stories to gain an audience."¹¹³ Out of this complexity can emerge a range of possible outcomes from which parties to a mediation can choose.

b. Role of mediator

In the narrative mediation model, the mediator is seen as an active participant in the process. This approach recognizes that conflicts shape and are shaped by mediator practice in a potent and dynamic way. And, "whether they like it or not", effective mediators are fully immersed in the complex dynamics of the conflict between the parties.¹¹⁴ The moves the mediator makes throughout

¹¹¹*Id.*, at 90.

¹¹²*Id.*, at 161.

¹¹³*Id.*, at 53.

¹¹⁴*Id.* at 48.

the process influence the conflicting parties' actions and reactions, ultimately shaping how the conflict is addressed. Narrative mediation is best seen as a co-creative practice. While the mediator actively shapes the conflict, at the same time she actively assists parties to unearth their competencies and to reaffirm that they are experts in their own situation.

c. Practices, Strategies, Techniques

The mediation process consists of a series of relational and dialogic practices. Relational practices are ones that foster understanding, respect, cooperation and trust.¹¹⁵ The mediator creates a relationship climate in which a spirit of understanding is allowed to flourish, whether or not parties are to have an ongoing relationship. The mediator models these forms of behaviour and encourages the parties to do the same.

Dialogic practices are ones that make visible the operation of the dominant discourse in order to create space for the development of an alternative one. The main form of dialogic practice utilized in this model are questions posed to assist the parties to reframe the conflict. Narrative thinking promotes a "subjunctive" mood by asking questions in terms of what could be. This is useful because while traditional approaches to mediation tend to narrow issues and their consideration: "The subjunctive spirit opens people's thinking to the possibility that things can be different. In this kind of climate, substantive change is possible."¹¹⁶

The main strategies employed within narrative mediation are:

- building trust in the mediator and the mediation process;
- developing externalizing conversations;
- mapping the effects of the problem on the person;

¹¹⁵The parties must develop a trust in the process and the mediator but it is not necessary for the parties to develop trust in each other in order to resolve conflict.

¹¹⁶*Id.*, at 53.

- deconstructing the dominant story lines; and
- developing shared meanings about the conflict and its solutions.¹¹⁷

Trust is crucial to the successful outcome of any mediation. When people feel hurt by the actions of others, they tend to rework aspects of the conflict story to reinforce their own sense of injustice, betrayal, victimization, or mistreatment. This cycle can be interrupted by the mediator's use of the narrative metaphor to convey to each party that he has grasped the depth of their distress without appearing to collude with each party's problem-saturated description.

Trust is built through careful and respectful listening. The mediator fosters a climate in which stories are taken seriously. She reinforces the assumption that both parties are doing the best to address the conflict with the resources at their disposal.¹¹⁸ However, she may work toward expanding the nature of the resources the parties have by enlarging their ideas about what they could be doing to address the conflict.

Public acknowledgment in the form of a greeting, where a subject directly recognizes the subjectivity of others, also fosters trust. This dynamic has been explained in this way:

Greeting is the communicative moment of taking the risk of trusting in order to establish and maintain a bond of trust necessary to sustain a discussion about issues that face us together.¹¹⁹

In addition to helping to establish trust, gestures of greeting function to acknowledge relations of discursive equality and mutual respect among the parties to the discussion, and forge connection

¹¹⁷These are discussed in detail in *id.*, Chapter 3, A Narrative Model of Mediation, 57-93.

¹¹⁸The term resources is broadly defined to include emotional, intellectual and material assets, including awareness of alternatives to the current situation.

¹¹⁹Young, *Inclusion and Other*, at 58 based on Emmanuel Levinas, *Otherwise than Being, or Beyond Essence* (trans. Alphonso Lingis. (The Hague: Nijhoff, 1981).

based on the previous relationships among the parties.¹²⁰ Greetings are ritualized parts of the conflict resolution processes in many cultures and are actively integrated into the narrative mediation process.

Externalizing conversations are one of the most powerful methods that narrative practitioners can use to help conflicting parties dis-identify with the problem story and begin to develop shared meanings, understandings and solutions.¹²¹ This helps the parties to separate from a story that locates the conflict in the nature of either person or to the relationship.¹²² As mediators externalize a problem, they speak about it as if it were an external object exerting an influence on the parties, but they do not identify it closely with one party or the other. This assists the parties to focus on the effect of the conflict rather than on the inadequacies of the other party.

In narrative mediation, a lot of energy is put into developing fuller accounts of the conflict in order to enrich the participants' perspectives. This can involve building in a time orientation to help parties to gain clarity of how conflict is changing and possibly escalating. Particular attention is paid to questions that map the effects of the conflict on each person associated with it. These strategies help to build momentum and volition within the parties toward change.

In narrative mediation, discourse exploration is a useful tool for de-personalizing conflict. People can be influenced by a number of discourses at the same time. Naming the discourse helps the mediator and the parties to sort it out. One technique to achieve this is "deconstruction" which in this context refers to the "unpacking" of the taken-for-granted assumptions to which everyone has become subject as a result of the operation of societal discourse. Deconstruction is achieved by adopting a different position in a discourse than that which is considered normal. This permits the participants to view the situation from a new perspective. In this way, "the familiar is rendered

¹²⁰Young, *ibid.*

¹²¹M. White, "The Externalizing of a Problem," *Dulwich Centre Newsletter*, 1989, special edition, at 3-21. Cited in Winslade and Monk, at 6.

¹²²Winslade and Monk, at 79.

strange, the logic of dominant stories no longer appears inevitable; gaps and inconsistencies are made clear; and opportunities to resist an unquestionable truth are made clear."¹²³

Deconstruction is less confrontational or adversarial than critique. In narrative mediation, the main mode of operation is "curious exploration" rather than acceptance, with a view to creating new meanings. This process is not defined by competition or confrontation, but rather a respectful inquiry into assumptions. Exploration reveals not just the details of what transpired but also the worldview out of which standards of judgment arise. A deconstructive inquiry renders these background assumptions visible and open to revision. Deconstruction involves tracking the background narratives and identifying the themes that underpin the conflict. This includes naming and addressing cultural assumptions and entitlements that effect the development of the conflict stories.

Potential for transforming conflict also arises from the realization of the "multiple subjective and a different approach to the nature of the self."¹²⁴ Narrative mediation can assist in looking for the narrow cultural and social prescriptions that constrain people's ability to view the options available to them: "through the postmodern lens, a problem is seen not as a personal deficit of the person but as constructed within a pattern of relationship."¹²⁵ Social context is key to understanding self and identity. This embodies a much more dynamic view of human nature. The individual self is seen as being constituted "by myths, traditions, beliefs, assumptions, values of one's particular culture, all developed within discourses."¹²⁶ It is the repetitive interactions between people rather than some built-in stable nature that provides stability and a sense of continuity to human relations.

¹²³*Id.*, at 75.

¹²⁴*Id.*, at 44.

¹²⁵*Ibid.*

¹²⁶*Id.*, at 45.

This understanding is critical for narrative mediation. It affects what people select for attention from what they say. It also shapes how one makes sense of another's stories: "We hear other people's stories in context of overlapping identities, interests and discourses."¹²⁷ The mediator strives to bring forth overlapping descriptions of the dispute (rather than a singular, coherent account) in order to create space for new meanings to emerge. Each new meaning offers an opportunity for participants to reposition themselves in an alternative discourse.¹²⁸ Conflict is not seen as a binary, either/or situation, but rather as a situation characterized by grey areas, dilemmas and internal conflicts. The mediator needs to explore these intricacies. Thus, complexity is an ally rather than an enemy of the process.¹²⁹

All of these strategies contribute to naming and disarming the conflict. The next step is fostering the development of shared meanings about the conflict and its solutions. Mediators focus on "opening space" by emphasizing how the parties are the creators of the meaning of the conflict. Specific techniques for doing this include inviting the parties to judge the problem; soliciting the making of new meanings; and seeking "unique outcomes", that is outcomes that would not have been predicted by the original conflict stories. Unique outcomes and newly-developed shared meanings are the basis upon which a new story, or resolution, is built.

d. Addressing Entitlements

Winslade and Monk's narrative model of mediation places great emphasis on the need to consider and address the effects of exaggerated entitlement on the creation of conflict, and the subsequent implications for managing the mediation process. Entitlement is constructed within a cultural context and seen to shape human needs and interests in diverse ways. Narrative mediation can be

¹²⁷*Id.*, at 46.

¹²⁸*Ibid.*

¹²⁹*Ibid.*

used to deconstruct entitlements in an attempt to assist people to build more equitable relations in the process of resolving a conflict.

The focus on the concept of entitlement is based on an understanding of the way power operates in discourse.¹³⁰ Discourses offer people positions of greater or lesser entitlement: "within particular discourses, some positions are rendered more legitimate or more visible and others are subjugated. Some voices get heard and others are silenced".¹³¹ Power in this context is a relational and unstable phenomenon.

Mediators must be aware that power is produced or reproduced throughout the mediation process. The concept of "empowerment" is problematic though, because it relies on the commodity metaphor of power.¹³² The preference is to focus on entitlements and the ways the narrative mediator encourages people to "take up opportunities to resist the operation of power in their lives".¹³³ Entitlements are defined in this way:

Patterns of entitlement emerge from within a complex network of power relations and societal narratives. Although entitlements often arise from dominant discourses that are present in the community, they sometimes emanate from alternate discursive content.¹³⁴

One example of entitlement that manifests itself in many conflicts is gender entitlement, which is "strongly linked to discourses of patriarchy which tends to privilege the interests of men over the

¹³⁰As opposed to seeing in material terms as a commodity or as a hierarchical position.

¹³¹Winslade and Monk, at 50.

¹³²Winslade and Monk take a different perspective on it than on some other transformative mediation approaches. For example, Folger and Bush emphasize empowerment and recognition as two central objectives of mediation in *The Promise of Mediation*.

¹³³Winslade and Monk, at 51.

¹³⁴*Id.*, at 94.

interests of women."¹³⁵ Similar discourses identify entitlements corresponding to age, disability, sexual orientation, religion and social condition. Any community legitimates entitlement along a variety of identity dimensions. Within specific times and places, the extent to which discourses offer, regulate and preclude particular forms of identity will vary.

An example of an act of claiming entitlement was Rosa Parks' insistence upon holding onto her seat in a bus one day. This was an act that challenged the exaggerated status and entitlement of white Americans in the South and "began one of the most successful civil rights movements of the twentieth century."¹³⁶ This act of entitlement is seen from the perspective of a readiness within the African American community to challenge racism that reflected the fact that an alternate discursive context was emerging in contrast to the dominant racist one.

This example illustrates how entitlement formations are not immutable. They operate differently in different discursive contexts. The concept of cultural context introduces a further complexity in the way entitlement is legitimated. To illustrate this point, Winslade and Monk cite the example of a white, heterosexual, able-bodied man working in settings that privilege non-white, disabled homosexual-identified men, where he may find his access to an entitled position seriously diminished compared to his access in a Western majority cultural setting where his dominant identities are legitimated. They argue that identity and entitlement are fundamentally linked, each defining and being defined by the other.¹³⁷ Thus, another distinct advantage of the entitlement approach is that mediators can see parties as representing a multitude of identities: each of which promotes or diminishes the level of entitlement permitted by the discursive context. There is a dynamic relationship between identity and entitlement.

This perspective on entitlement also places renewed importance on the agency of the participants in

¹³⁵*Id.* at 96.

¹³⁶*Id.*, at 95.

¹³⁷*Id.*, at 99.

a narrative mediation. From the social constructionist perspective, agency is "the act of diminishing the extent to which the discursive context can capture and control a person's activities."¹³⁸ This suggests that participants in a mediation can work toward understanding and changing the way that entitlement is expressed by a person's interactions with others.

Winslade and Monk recognize that there is enormous variation in the extent to which people are constrained or encouraged by their position within a discourse:

It makes no sense to speak of somebody as completely powerless or having no ability to act. Viewing agency from this perspective acknowledges that there are opportunities to act in apparently powerless circumstances in a variety of settings at different times. Moving away from viewing oppression and marginalization in global terms sensitizes the mediator to notice how a person has the capacity to act, albeit in some modest way.¹³⁹

The introduction of the concept of entitlement into mediation offers the mediator a more sophisticated analysis of power relations in the mediation process. It alerts the mediator to the systematic patterns of marginalization and legitimation that are featured within a conflicted interaction. But it also invites the mediator to consider how the multitude of competing entitlements ebb and flow within the mediation conversation.

The role of the mediator is pivotal because she can either promote social justice and attend to equity and unfairness, or reinforce unjust dominant cultural practices. In narrative mediation, the mediator needs to take an overt position in challenging and addressing the exaggerated entitlements that arise for individuals because of their discursive positions. The mediator is not neutral on these issues:

Narrative mediators may state openly their opposition to violence, racism, and sexism. They may open to question what is considered the norm because the norm is a cultural product that

¹³⁸*Id.*, at 100.

¹³⁹*Ibid.*

privileges some groups of people. To be neutral and not challenge the norm may serve to support privilege.¹⁴⁰

This is a very different approach in comparison to traditional methods of mediation that emphasize the importance of mediator neutrality.

Mediators are able to employ strategies for equalizing entitlements while preserving trust that is required for the mediation to work. This balance is achieved by separating the dominant discourse which creates the entitlement from the participant who benefits from it. The entitlement becomes seen as an external force that must be addressed by both parties.

e. Summary

One of the scenarios employed by Winslade and Monk to illustrate their method is that of addressing child custody issues after a separation. They show how each parent began with a well-developed problem-saturated narrative about the conflict described in fixed and unyielding terms in a manner that created an opponent out of the other parent. For various reasons, the mother was highly motivated to participate in the mediation, while the father was highly reluctant. The situation was one of great mistrust with each party casting blame on the other.

Over a series of individual and group sessions with the mediator, the originally tightly woven stories were opened up and solution-bound narratives were developed. This involved developing new ways of looking at the past and current conflicts, disassembling cultural prescriptions for the parenting role, and naming the dominant gender-based discourses that initially structured the conflict. A large part of this work took place through individual "deconstructing conversations" with each parent.

Through this process trust was established, initially between the parties and the mediator and

¹⁴⁰*Id.*, at 100-01.

eventually between the parties themselves. This was not a unilinear process and the building and re-building of trust was constant feature of the process. The outcome was described both in terms of a new story of the relationship, from a couple relationship to a parenting one and a specific agreement on the ways that this relationship was to work. It provided a foundation within which further and future difficulties could be addressed by the parties.

In summary, a narrative approach to mediation stresses the following:

- the privileging of stories and meaning over facts;
- the hearing of people's stories of conflict as they are produced in discourse;
- the clear separation of conflict-saturated stories from stories of respect, cooperation, understanding and peace;
- the use of externalizing conversations to help disputants extract themselves from problem stories that have held them in thrall;
- the creation of a relational context of change as a primary task of mediation in preference to the pursuit of an agreed-upon solution; and
- the selection of alternate stories for development as pathways out of disputes.¹⁴¹

This is a robust theory of mediation and a coherent account of a credible practice that makes a strong contribution to the development of a transformative mediation model. A comparison of the narrative mediation model with existing legal models and the requirements in a human rights setting are discussed in the following section.

4.4 Towards the Transformative Mediation of Human Rights

This section reviews the potential of transformative mediation in the human rights context. The narrative mediation model is assessed and tailored to the requirements of this setting. The potential

¹⁴¹*Id.*, at 250.

of this model is briefly explored in terms of possible individual and systemic applications. General issues related to its implementation are identified and discussed.

A. Transformative Mediation of Human Rights

(i) A tailored model of transformative mediation

The ability of current mediation models to address human rights issues in a transformative way is clearly limited. However, mediation is a highly flexible social practice and there are a large range of possible third party roles, structures, and procedures. The theoretical and practical developments within the transformative public resolution school pave the way for a fundamentally new approach to resolving human rights issues. The discourse principles and vision of the role of rights norms outlined in the previous chapter can be integrated into this approach in order to develop a mediation model that can be considered a transformative human rights practice.

The narrative mediation model meets many of the requirements of transformative human rights practices as set out in this study. In particular, narrative mediation is a highly participatory, critical-reflective and reflexive practice. It is inclusive and consciously works toward equality between the parties through a sophisticated approach to dealing with the discourse entitlements that arise from structural inequalities. It can be seen as an advancement over the positional bargaining and problem-solving models in several ways.

One of the strongest advantages of the narrative model is that it involves paying much more attention to first phase of defining the conflict. Rather than taking interests as a given, they are developed through a renewed understanding of the relational context between the participants. This redefinition does not result in reifying these interests, rather it works to uncover transformative possibilities within the conflict.

Another advantage of narrative mediation is the greater potential in terms of substantive outcomes. This potential derives from the fact that it does not take the existing situation as a given. The approach is "not to talk about solutions or "win-win" outcomes but rather, discursive repositioning."¹⁴² As a result, it contributes to the conscious reshaping, albeit in some small way, of the discourses out of which needs and interests are produced. The "outcomes" are the grounds upon which new more equitable basis for interaction among parties is built.

In order to fully meet the requirements of transformative practice, the narrative model must be expanded to deal more specifically with the principles of publicity and reasonableness. Both of these principles are linked to the integration of norms and the public interest in strengthening human rights into the mediation process. These issues are outlined here and developed more fully in the next sections and in the following chapter on implementing transformative practices into human rights processes.

As currently described, the narrative mediation approach appears to be more of a private dispute resolution model than a fully public one. The emphasis on individual psychological processes reinforces this perception. However, mediations are always public in the sense that the mediator is a third party who listens to the dialogue between the parties. This shapes the ways the participants interact in an important way that distinguishes mediation from bilateral discussions.

In order to reinforce the public nature of this model, the mediation must be treated as a public forum, even if in fact the discussions are private and confidential. Regardless of the setting, the forms of expression used by the participants must be public in the sense that claims, arguments, appeals, or stories or are presented in ways that try to be accessible and accountable to anyone. This involves developing a mediation process in which the participants come together to discuss collective problems under a common set of procedures and hold each other accountable. In the human rights context, the mediator is a public steward charged with the function of actively pursuing the public

¹⁴²*Id.*, at 90.

interest as defined by human rights legislation. She has an important role in ensuring that the public nature of the mediation is established and maintained.

The second related issue is the role of human rights norms within transformative mediation. As discussed in Chapter 2, there are strong concerns about the potential of informal methods to take human rights norms into account in the resolution process. In existing mediation practices in the human rights context, established rights norms can be applied since the mediation process takes place in "the shadow of the law".

As in many normative discourse models, there is no discussion of the role of rights norms in the narrative mediation model. The emphasis placed on consciously addressing entitlements is an important advancement over existing mediation models. Although this places equality as a central norm within the process, it does not go far enough in this respect. Dialogic processes require participants to submit their beliefs, values and preferences to reasoned discussion. The narrative mediation model does not incorporate this view as it emphasizes the post-modernist view of fundamental subjectivity.

However, human rights norms can be integrated into this mediation model by making them the framework for the "reconstruction of the story". In this way, human rights norms add a component of reasonableness to narrative mediation practice. According to the transformative framework, mediation should work toward achieving intersubjective consensus on the interpretation and application of human rights norms in the conflict situation.

Although the task of mediation can be considered "to be a teasing out of these stories in order to open up possibilities for alternative stories,"¹⁴³ the eventual result must be the reconstruction of the narrative in terms consistent with basic human rights norms. The mediator can encourage participants to think about the conflict in terms that relate to basic human rights norms and to

¹⁴³*Id.*, at 53.

consider how an application of these norms could work. This is quite different from the evaluative mediation model where existing legal norms are presented as fully formed to be directly applied. Rather human rights norms have an indirect, but ultimately stronger impact, as the participants themselves integrate these norms into their ongoing discourses.

By integrating the principles of publicity and reasonableness as linked to human rights norms, the narrative mediation model can be tailored to the human rights context. This renewed model is referred to as transformative mediation in this study. It is transformative in the sense that it is a self-consciously educative model that leads to social learning through law. Transformative mediation is a model which has the potential to link individual reassessment of entitlements and disentanglements to the identification of and developing responses to opportunities for social transformation leading to social justice. As such, it is a practice that could contribute to create and recreate equality on a day to day basis.

(ii) Individual and Systemic Applications

The transformative mediation model could be integrated into the current human rights complaints process. Rather than displacing current practices, this mediation model would be one option within the individual complaints system. Clearly, there is a range of choices involved in mediation processes and types of mediator interventions. None of the models are right or wrong per se and the main issue is the ability to diagnosis when to use which type of mediation. At least in the short term, there is no doubt that both adversarial and collaborative means of resolving differences will be required. The techniques of conflict resolution that are successful under some conditions may lead only to fiasco in other circumstances.¹⁴⁴

Some human rights issues can be characterized as disputes, that is where the problems that have

¹⁴⁴Dukes, *Resolving Public Conflict*, at 176.

arisen do not extend to a need to reconsider the underlying sources of conflict. An example of this is where both parties agree on the need to accommodate the requirements of an employee within the workplace but disagree as to the means by which this can be accomplished. In this scenario, a problem-solving approach that is informed by rights norms is likely to be adequate. However in most instances, a transformative mediation approach will be required in order to develop a shared meaning between the parties about the equality rights and obligations to be applied.

Mediation is often seen in terms of phases: agenda-building or problem-definition; information exchange; negotiation phases (where alternatives are developed) and resolution phase (where agreement is made).¹⁴⁵ Potentially there is a role for different types of mediation in different stages of a human rights conflict as well as for different types of conflict.

Any decision as to appropriateness of a given model of mediation is value-based. These will have important implications for both process and outcome. All dispute and conflict resolution models have a systemic impact, either reinforcing the status quo or challenging it. While current mediation models limit the level of challenge and therefore the potential of social change, the transformative mediation model broadens and enhances these possibilities. The policy choices involved in implementing this model, and related questions of institutional design are explored in the next chapter.

While much of the discussion in this chapter focuses on the mediation of individual complaints, transformative mediation also has potential systemic applications. This potential relates to the recognition that human rights principles can be created and not simply applied through mediation.

An example of a systemic application is the integration of transformative mediation practices into the public hearing function of human rights commissions. This model would be more dialogical and relational than existing models. Today, the emphasis is on "hearings" in which various parties

¹⁴⁵Jones, "A Dialectical Reframing", at 42.

present their defined views to the commission and then the commission submits these to reasoned discussion and presents recommendations for reform. Under this enlarged view, the role of the commission would be to engage in a broad, public conversation about a given human rights issue. Suggestions for reform would develop through a structured public, story-telling process, involving deconstruction and the reconstruction of an alternative story to govern relations within the community.

In addition, the transformative mediation model can be applied in a more figurative way. This involves departing from the image of this deliberative practice as a face to face interaction and links it up to the themes raised in the discussion of promoting a broader discourse on human rights. For example, we could think in terms of what type of facilitator or mediator is required to create the public conditions for discourse. The courts have a role in this, however it may be that institutional change is required to either strengthen this function to develop a new mediating institution. For example, an independent institution could be established to oversee the process of human rights reporting to international treaty bodies in order to "mediate" between the competing perspectives on the meaning and implementation of international human rights claims. Similarly, the image of the transformative mediation model could be applied to the dialogue between courts and legislatures as seen as a form of "meta" conflict resolution. These ideas are further explored in Chapter 7.

B. Issues in the Mediation of Rights

The potential for integrating transformative mediation practices into human rights procedures can not be assessed in a straightforward manner because of current conceptions of procedural and substantive fairness. These conceptions are founded on adversarial modes of resolving conflict that shape current human rights practices. Concerns about fairness cannot be ignored, but neither can they dictate an evaluation of alternative models. The boundaries of what constitutes "fairness" must be redefined from a transformative perspective before potential of transformative practices can be fully assessed.

The main issues raised in implementing alternative models of mediation can be grouped into three themes: mediator roles and neutrality; power imbalances and fairness; and human rights norms and the public interest. The differences in how these issues are addressed under adversarial and transformative approaches are canvassed in this section. The practical consequences of this discussion are examined in the next chapter.

(i) Mediator Roles and Neutrality

Mediator neutrality is a pervasive mythic belief within the theory and practice of mediation. This myth is quite simply wrong. Regardless of the underlying model of conflict and negotiation, mediators are not neutral. They shape the dispute and its outcome through their intervention. This fact contrasts with the strangely persistent belief, even among many mediators that a proper mediator must be neutral, nondirective and impartial.

Several empirical researchers have demonstrated the way mediators influence the process and outcomes of mediation.¹⁴⁶ The reality is that strong departures from this mythic ideal are not only common but particularly needed in highly polarized conflicts.¹⁴⁷ Indeed, if the mediator were not expected to have an influence then the parties should simply be able to settle their conflict with assistance through negotiation.

In many mediation environments, the third party is deeply implicated in the dispute.¹⁴⁸ In these cases, the mediator's involvement and commitment to achieving a workable, fair and self-sustaining resolution is highly beneficial. For example, "emergent mediators" often have a strong vested

¹⁴⁶See for example, Rifkin, Millen and Cobb, "Toward a New Discourse for Mediation"; K.Kressel and D.G. Pruitt, eds., *Mediation Research: The Process and Effectiveness of Third Party Interventions* (San Francisco: Jossey-Bass, 1989); K.Kressel, "Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm" (1997) 13 *Negotiation Journal* 143.

¹⁴⁷Kressel, "Mediation", at 538.

¹⁴⁸See, Peter Berger, "Conclusion: General Observations on Normative Conflicts and Mediation" in *The Limits of Social Cohesion* ed. Peter Berger, (New York: Westview Press, 1984).

interest in the outcome of the dispute and are usually willing and able to mobilize considerable social and other pressure toward resolving the conflict and maintain ongoing ties to the parties after mediation effort ends.¹⁴⁹

Despite this empirical evidence, a mediator's ability to protect her neutral role remains an important aspect of current approaches to ensuring procedural fairness within a mediation. A review of the literature on whether or not mediators need to be neutral concludes that there is no consensus and very little good discussion on this important point.¹⁵⁰ Neutrality is not an "either/or" phenomenon, it needs "to be seen as multidimensional, with not all dimensions present in all circumstances."¹⁵¹

One important approach is to separate the concepts of neutrality and impartiality in order to better understand the third party role. In the litigation context, the distinction between neutrality and impartiality has also recently been clarified by the Supreme Court of Canada.¹⁵² The argument has been made for a more sophisticated understanding of what neutrality means in the mediation context:

In the case of both judicial and administrative bodies, both neutrality and impartiality are requirements of all decision-making. In the case of mediation, each concept has a different significance. Impartiality must be seen as a core requirement in mediation, in the sense that its absence would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly. Neutrality however, is a less absolute requirements and could be waived without prejudicing the integrity of the mediation process... While impartiality must be a constant feature of mediation, the existence of neutrality will always be a question of degree.¹⁵³

¹⁴⁹Emergent mediators have a continuing relationship with the parties, in families, friendship groups, organizations of all kinds and international relations. Kressel, "Mediation", at 528.

¹⁵⁰Boulle and Kelly, at 21.

¹⁵¹*Id.*, at 23.

¹⁵²In *R. v. R.D.S.*, see discussion in Chapter 6, section 6.2.B.

¹⁵³Boulle and Kelly, at 22.

Neutrality is not a goal or a value in and of itself. Rather, it is seen as a means to another end. It is a way for the mediator to gain trust, acceptance, and, ultimately entry in the process.¹⁵⁴ However, neutrality is not the only or even the best way to achieve these objectives. Additionally, the myth of mediator neutrality is predicated on the radical separation of process and outcome: the mediator is supposed to only have an impact on process. However, process and substance are more accurately seen as interdependent, therefore a mediator will have an impact on both.

The rhetoric of neutrality has a limiting effect on the development of mediation practices. The position taken in the transformative mediation model is that the assumption of a so-called 'neutral' stance in public disputes is morally and ethically untenable. This neutral stance serves to legitimize power relations and acquiesces in a perpetuation of the status quo. In fact, neutrality within a setting of power differentiation is another form of partisanship.¹⁵⁵

The current circumscribed conception of neutrality could be replaced by a conception of third-party independence and responsibility which "recognizes and embraces the values implicit in conflict resolution process."¹⁵⁶ In this context, independence means being responsible to, aligned with, or obliged to no one individual, group or interest. Responsibility means that the power inherent in the third-party role is used with full awareness of its potential consequences to disputants and affected publics.¹⁵⁷ Abandoning the conception of neutrality does not mean becoming an advocate for one party relative to another. The distinction needs to be made between advocacy for a party, advocacy for the outcome, and advocacy for the process.¹⁵⁸ An independent third party advocates for

¹⁵⁴Dukes, at 176.

¹⁵⁵M. Chesler, "Alternative Dispute Resolution and Social Justice" *Injustice, Social Conflict and Social Change* ed. Lewis and Douvan (San Francisco: Jossey-Bass, 1992).

¹⁵⁶Dukes, at 177.

¹⁵⁷*Id.*, at 175.

¹⁵⁸J.H. Laue, "The emergence and institutionalization of third party roles in conflict" in J.Burton and F.Dukes (eds) *Conflict: Readings in Management, Settlement and Resolution* (New York: St.Martin's Press, 1990).

processes seeking certain qualities of outcome, including fairness, inclusiveness, openness, and endurance.

This reconception of the third party role, as independent but not neutral, explicitly recognizes that in public disputes there are other interests that are not directly represented by the parties. These other interests can be seen in terms of the general public, groups or individuals who will be affected by the outcome but are not included in the process, and future generations.¹⁵⁹ Mediators need to take an active role in meeting responsibilities to the public interest in terms of precedents and the impact on un- or under-represented groups.

(ii) Power Imbalances and Fairness

A second major issue is the capacity of transformative mediation practices to deal with issues of power and power imbalances. One of the main criticisms of mediation is that it is unable to adequately address power issues and therefore does not protect weaker parties from unfair processes and outcomes.¹⁶⁰ These issues have been particularly well canvassed by feminist scholars.¹⁶¹

A number of procedures and techniques are currently being used to address power issues within existing mediation practice. For the most part, methods developed to deal with power do so by defining fairness of outcome relative to a litigation outcome. These measures include: protection for parties from undue pressure to settle; requirements to be consistent with the existing law; review

¹⁵⁹L.Susskind, "Environmental mediation and the accountability problem" (1981) 6 *Vermont Law Review* 1.

¹⁶⁰For this view from an institutional perspective see: Gay Clarke and Iyla Davies, "Mediation - when is it not an appropriate dispute resolution process?" (1992) *Australian Dispute Resolution Journal* 71; and *CHRA Review Panel Report*, at 81-3.

¹⁶¹There is no one single feminist perspective since some researchers see possibilities as well as dangers in mediation in situations of power imbalance. See for example: Janet Rifkin, "Mediation from a Feminist Perspective: Promise and Problems" (1984) 2 *Law and Inequality* 21; Eve Hill, "ADR in a Feminist Voice" (1990) 5 *Journal of Dispute Resolution* 337; Karen Mack, "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 *Adelaide Law Review* 123; T.Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal*, 1547.

procedures such as reporting back to the court/commission or court/ commission approval of settlements.¹⁶²

The transformative approach is also subject to these concerns over the operation of power within the mediation process. Mediators can, like everyone, legitimize certain stories over others, thereby privileging certain disputants over others. The model also recognizes that not all people share equal access to the narrative process. In particular, gender, age, racial and cultural differences and so on, all affect one's ability to construct a story that is recognized by others as coherent. Like in all conflict resolution process, active steps need to be taken to consciously deal with power issues throughout a mediation process. The mediator must reflect on her own role in perpetuating dominant discourses and work against it. In addition, she must take steps to deal directly with inequalities in the process.

Transformative mediation is based on a different conception of power. In particular, it is based on the view that power is not static. In order to meaningfully address disparities, an examination must be made of the sources of inequality in negotiating power within a specific context. Transformative mediation deals directly with entitlements as they play themselves out in the discourse. The mediator must be highly aware of, and pay close attention to, entitlements in background social norms. In addition, she must have the skills and ability required to detect how they play out in a specific mediation.

The mediator must be prepared to intervene directly to address this dynamic. She does so by registering when a party has a private set of assumptions about an injustice that is based on unearned privilege claimed at the expense of the other party. By being attentive to how systematic patterns of entitlement are featured in conflict, the mediator can make efforts to assist those whose voices are

¹⁶²Buckley, "Dispute Resolution Options" at 118-22.

often silenced or marginalized. This assistance needs to be approached by the mediator in a manner that does not alienate the party who appears to be the most advantaged as the mediation begins.¹⁶³

In a fundamental sense, transformative conflict resolution and mediation value equality and can embody the ideal of social justice. Properly constituted, transformative human rights practices encapsulate a seamless relationship between process and outcome and therefore has the potential to contribute to the eradication of discrimination.¹⁶⁴ They accomplish this by ensuring that the parties reflect upon structural and cultural barriers to inclusiveness and equality, by facilitating critical reflection and learning about inequality and disadvantage and by contributing to the development of equality norms in specific contexts.

iii) Human Rights Norms and the Public Interest

The third major concern with informal resolution processes involves the protection of legal norms and the public interest. Mediation is not seen as having the capacity to apply legal rules in the same way as adjudication. A related concern is that because mediation does not involve the application of legal norms insufficient attention is paid to the public interest. However this premise is based on a limited understanding of the role of legal norms in mediation.

All disputes are resolved in terms of norms and standards.¹⁶⁵ In litigation, the impact of the legal standard is expressly articulated. While it may not always be explicitly recognized in a mediation, it can be inferred from settlement. When a mediation takes place in the context of a process structured by a judicial or quasi-judicial institution then legal norms will have some impact on settlement process. In some processes, such as evaluative mediation, this role is made explicit.

¹⁶³Winslade and Monk, at 101.

¹⁶⁴*Ibid.*

¹⁶⁵Boulle and Kelly, 42.

Research has shown that authoritative decisions have an impact on process and outcome in informal processes.¹⁶⁶ However, it is correct to recognize that there is a greater degree of freedom for the parties to interpret general rights norms in a way that applies to their particular situation through mediation processes as compared to litigation. This can be seen as either an advantage or a disadvantage of mediation.

The role of law and legal norms when people resolve disputes outside of adjudication cannot be seen as a straightforward application of known principles tailored by the parties to their situation. It is much more complex. For example, it has been shown that rules are formed and not simply applied in the negotiation process. The norms in question are not necessarily legal rules, but are rules nonetheless. These are "party-articulated" rules rather than "judicially-articulated" rules, even so they may not be limited to the facts of a specific dispute.¹⁶⁷

The role of law in informal dispute resolution processes has been further extended to support the view that these processes can result in the creation of new and different legal norms. Customary law develops from interaction among people and through various forms of social ordering, including through mediation. These alternative laws can facilitate human interaction in ways which are different from laws that result from adjudication or legislation. It has been suggested that the quality of the order that is created by the legal system is heightened by outcomes of different kinds of dispute resolution processes.¹⁶⁸ For example, there is evidence that mediation is changing the language of legal disputes, for example in family law.¹⁶⁹

¹⁶⁶See Mnookin and Korhauser, "Bargaining in the Shadow of the Law".

¹⁶⁷*Id.*

¹⁶⁸Fuller's articles on this topics include: "The Forms and Limits of Adjudication" 92 *Harvard L.Rev.* 353 (1978); "Mediation Its Forms and Functions, 44 *S. Cal. L. Rev.* 305 (1971); "Law as an instrument of social control and law as a facilitation of human interaction: (1975) 2 *B. Y.U.L.Rev.* 89; "Some Unexplored Social Dimensions of the Law" in *The Path of Law* (A. Sutherland ed., 1968) 57.

¹⁶⁹Boulle and Kelly, 38.

In practice, this freedom to depart from the rules, principles and policies which are binding on courts, arbitrators and administrative bodies is not unlimited. There are constraints on the ability of parties to base their mediated decisions on self-selected norms especially in legal settings. First, agreements cannot be illegal or contrary to public policy. Secondly, the dynamic of the "shadow of law" tends to restrict the range of likely legal outcomes to a dispute since it affects the parties' bargaining power and ultimately the settlement itself. In addition, mediators generally will cause the process to move towards the application of objective norms, often wholly-defined by legal precedent.¹⁷⁰

In the existing human rights complaints process, the public interest is generally equated with ensuring that mediation outcomes are comparable to what would be achieved through adjudication. The requirement to take the public interest into account is dealt with in a number of ways. These include: the way the mediation process is designed; devising a public interest intervention role for the commission; and the review, approval and/or reporting of settlements. However the transformative model suggests that a broader understanding of the role of norms is required.

Three models have been developed to describe the potential role of settled legal norms and other social norms in the community mediation model. These are: private-ordering; community enhancing; and, community-enabling mediation.¹⁷¹

The first model is the private-ordering understanding of mediation. Here, a mediator simply teases out the parties' values and helps them craft a resolution that reflects those values. The mediator is neutral about the standard to be applied to the dispute. The values of law or other reflections of community standards are relevant only if a party wants to incorporate such values in the process

¹⁷⁰*Ibid.*

¹⁷¹C. Freshman, "Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing versus Community-Enabling Mediation", 44 *UCLA L.Rev.* (1997) 1687.

and/or outcome. Private ordering suggests that individuals can and should structure relationships and solve disagreement without turning to the community or legal standards and values. This privileges local knowledge: individuals closer to the scene might get the facts right better than distant, general jurists.¹⁷²

The second model is a community-enhancing understanding of mediation. Here, the mediator assists individuals to order their activities and resolve their disputes consistent with the values of some relevant community. This reinforces the individuals' sense of connection to a particular community.¹⁷³

A third genre is community-enabling mediation. This process is designed to bring out the kinds of preferences and values that individuals would express if they were given information about different values and different options and were encouraged to consider seriously these different values and options.¹⁷⁴

The complexity of the dynamics of legal and non-legal norms can also be understood in functional terms. From this perspective, mediation has the potential to serve three distinct functions: norm-generating; norm-educating; and norm-advocating.¹⁷⁵ In the norm-generation model, the only relevant norms are those the parties identify and agree upon. In the norm-educating model, the mediator sets out existing norms and these considerations assist the parties to make their decision. In a norm-advocating model, the mediator sets out relevant norms and insists that they be incorporated into the agreement.

¹⁷²C.Menkel-Meadow, "When Dispute Resolution Begets Disputes of Its Own", at 1707.

¹⁷³Freshman, at 1692-93.

¹⁷⁴*Ibid.* at 1695.

¹⁷⁵Ellen A. Waldman, "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach" 48 *Hastings Law Journal* 703 (1997).

These two approaches to modelling the role of norms in mediation are complementary and together provide a more nuanced view of the public interest in the mediation of human rights complaints. Rather than seeing the public interest as being served only through the direct application of established norms, our understanding is broadened to include the generation of new norms that is consistent with established principles. These innovative approaches to the interpretation and application of norms would be consistent with and extend the public interest in promoting equality. The processes of educating, advocating and generating norms can be understood in the context of building a relational community between the parties thereby enhancing the public nature of the process.

From the transformative perspective, the concern is that established law sometimes plays too great a role in mediation, rather than an insufficient one. The conventional view on strengths of the legal system (definitive, precedential rulings to promote clarity, certainty, and order) may actually be dysfunctional for the creation of innovative and idiosyncratic solutions to conflict. In effect, the ten percent of cases which are tried control the types of solutions which are achieved in the other ninety percent of cases.¹⁷⁶ Despite the reality that settlements could be more creative, "the truth is that the limited remedial imagination of lawyers who bargain "in the shadow of both the court and the law" often constrain settlements".¹⁷⁷

Transformative mediation is emphatically a public model which is based on fulfilling the public interest. The mediator is a public steward charged with this function.¹⁷⁸ As result, this model explicitly recognizes the role of human rights norms in shaping outcomes. However this dynamic is not seen as the direct application of settled interpretations of human rights. Rather, it is seen as

¹⁷⁶C.Menkel-Meadow, "Toward Another View of Legal Negotiation", *supra*, at 790-92.

¹⁷⁷C.Menkel-Meadow, "Pursuing Settlements in an Adversary Culture" 19 *Florida State U.L.R.* (1991) 1, at 24-5.

¹⁷⁸Schoeny and Warfield, at 266.

a creative process in which rights norms frame the mediation process, but do not always rigidly determine the outcome.

The transformative mediation model encompasses the community-enabling perspective and integrates the entire norm-educating, norm-advocating and norm-generating schema. Human rights commissions can not adopt a model that leaves to the parties the task of determining what the general norms are, that is what forms of discrimination will or will not be tolerated. However, given the "unsaturated" or "open-textured" quality of rights norm, there is almost always a creative or generative aspect to the educational and advocating functions mediation.

Transformative mediation could provide an alternative fora in which to develop the substantive content to human rights. It is a practice that has the potential for deconstructing entitlements, focusing on relationships and creating novel types of accommodation. This practice can be seen as a useful supplement to the production of authoritative statements on general principles through caselaw. One of the strengths of mediation is that it is by definition highly contextualized. This quality allows for the development of more relational and less abstract human rights norms and tailored to the situation. It may have particularly important applications in terms of negotiating remedies within the context of general directions from the courts or guidelines from the commissions, and in preventing future discrimination and promoting equality.

Human rights norms can be enhanced through the transformative mediation of human rights complaints. In some cases, this process of creating and re-creating equality extends to the generation of new aspects to rights norms within the overall framework of the principle of equality.

This reframing of the concern on the role of legal norms relates back to the construct of the public sphere. Conceiving human rights practices as located in various different sites is an important development. It opens up the possibility that the interpretation of rights by the parties within a mediation may be different from the way the right is interpreted as a principle or standard by the courts. In the current Canadian context, we see these multiple sites mainly in terms of a dialogue

between the adjudicative processes of the courts and human rights tribunals. However, here the focus is on the creation of another parallel discourse through the mediation of human rights complaints. These developments are brought into the broader human rights discourse within the public sphere thereby fostering the social learning process through law.

This chapter has investigated the philosophy of transformative conflict resolution as an alternative to the legal system's current focus on dispute resolution within a fundamentally adversarial structure. It has developed a normative model of transformative mediation based on existing narrative approaches and practices. Together with the conception of a broader normative human rights discourse within the public sphere developed in the last chapter, these approaches establish a foundation for a transformative ideal to guide human rights practices.

The next two chapters explore a number of practical steps that could be taken to apply this transformative ideal in the practices of human rights commissions and the courts. The purpose of this critical normative exploration is to identify and draw out positive elements within these institutions and to build on them. These glimpses of the transformative potential within current legal institutions motivate and guide movement toward the ideal.

This exploration serves two purposes. First, the exercise of applying these ideals within specific institutions contributes to further refinement of the conceptual framework established in this study. Secondly, it highlights potential reforms that could enhance the role of Canadian courts and human rights commissions in achieving society justice. However, these are only partial examples of the kinds of measures that could be taken to advance social justice through law, not fully developed proposals for reform.

CHAPTER 5

THE TRANSFORMATIVE IDEAL: HUMAN RIGHTS COMMISSIONS

5.1 Human Rights Commissions and Transformation

The implementation of transformative human rights practices in Canadian human rights commissions is examined under two main themes. The first is the focus on addressing discrimination through the complaints process. The second theme explores the broader functions of the commissions in promoting equality.

The complaints-handling function is often seen as addressing discrimination at an individual level, while the equality promoting function is seen to operate at the systemic level. However, this approach is inadequate in a transformative model of change. Creating equality at the individual and systemic levels is a seamless web: one cannot happen without the other. Movement toward the ideal of transformative practices requires building in this insight into all commissions processes and functions.

Like other administrative agencies, human rights commissions are established by governments to implement a specific policy. As currently cast in statutory language, human rights policy charges commissions with an important duty to achieve equality.¹ The proactive and positive aspects of this duty to ensure equality without discrimination and recognize that accommodation is needed to ensure that all may participate within society was highlighted in a recent review of the *Canadian Human*

¹Some reforms seek to modify this language to set out the policy objective of equality in broader or more descriptive terms. For example, by including references to social and economic rights.

Rights Act.² The importance of this task is further underscored by jurisprudence that ascribes a quasi-constitutional status to human rights provisions and requires a purposive interpretation to give rights their full recognition and effect.³ Human rights commissions are therefore best seen as change agents responsible for taking the human rights norms expressed in international and constitutional normative orders and implementing them in a specific field of relationships and activities.⁴

The ability of human rights commissions to fulfil this broad role is hindered by both an uncertain societal consensus on their mandate and weaknesses in processes and procedures available to carry out this mandate. The two are related. Concerted efforts are required to build support for commissions in the public sphere. These efforts should be focused, at least in part, on promoting understanding of commission processes. Many commissions have powers that are currently un- or under-exercised because of lack of initiative and ideas, lack of resources and/or concerns that there is insufficient political support. Consciously building support for innovative steps through reflective public deliberation is essential to all reform efforts. Efforts in this regard would give greater meaning to the concept of the commissions acting in the public interest.

Our understanding of this public interest function can be expanded by approaches that connect transformative mediation practices with the objective of fostering a broader human rights discourse. In effect, human rights commissions have a mandate to mediate human rights discourse within the

²*CHRA Review*, at 7.

³*Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Action Travail v. Canadian National Railway Co.* [1987] 1 S.C.R. 1114.

⁴Although human rights legislation predate the Charter, all of these normative orders share a common basis. This fundamental relationship is highlighted by the permeability of jurisprudence developed under each order. The Supreme Court of Canada has specifically endorsed common approaches to interpreting the Charter and human rights legislation (for example in *Action Travail*, *Andrews* and *BC v. BCGSEU*). Over the two last decades, concepts and interpretations given to rights norms under international instruments have begun to be used more prominently in Canadian jurisprudence.

public sphere.⁵ They carry out this facilitative function both in the complaints process and in their equality-promoting functions.

In keeping with the idea that law is a social learning process, commissions can be seen as change agents that operate mainly by facilitating a critical educational process. Participants in this process can include government actors, economic actors, and members of civil society. The learning process takes place within the public sphere. The critical and reflective aspects of this process must be underscored:

To learn from experience, people have to slow down their thinking process so that they can critically assess it. They need to get in touch with deeper feelings, thoughts, and factors that lie outside of their current mental and sensory models for taking in and interpreting the world they encounter. They have to step outside of the frameworks by which they understand experience, which can be disconcerting and at times difficult to do. Reflection can lead to new insight, but it can also cause frustration because people then have to develop new capabilities for double-loop learning⁶ and skilful conversation.⁷

Human rights commissions facilitate the critical learning process by fostering reflection about inequality through the prism of equality norms. They assist people and organizations to engage in "double-loop learning" and to acquire the capacity for "skilful conversation". This learning process takes place at a micro level in dealing with complaints which involves a relatively small number of people and at the macro level in equality-promoting functions such as the development and promotion of guidelines, public hearings and reports to government.

⁵This is not to say that commissions are the only institution that has this facilitative function.

⁶Argyris and Schon have proposed that there are two main modes of learning. The first is **single-loop learning** mode. In this mode, when things go wrong people try to state the same viewpoint differently and build stronger arguments to support their initial position. The second is the **double-loop learning** mode in which people reframe their position by analyzing assumptions, values, beliefs, and norms that influence their actions and interactions. C. Argyris and D.Schon, *Organizational Learning: A Theory of Action Perspective* (Reading, Mass: Addison-Wesley, 1978).

⁷Marsick and Sauquet, "Learning Through Reflection", at 398.

A critical and reflective education process fosters awareness of how patterns of behaviours and their structural counterparts create disadvantage and conflict. They also assist us to find ways to interrupt these dynamics through the practical reconstruction of attitudes and behaviours and the redesign of practices and institutions. Human rights norms shape this development of new responses to deal with conflict in the future. Hence, these processes are inherently prospective.

Critical learning processes facilitated by human rights commissions can be modelled on transformative mediation practices. In the first stage, commissions create conditions for engagement and the exchange of narratives as the first step in building understanding. The commission helps to create a respectful, safe environment for this exchange. Often this will require acknowledging the non-cognitive dimensions of conflict such as emotions and fears. An important starting point is the recognition of others who are involved and of the different perspectives on the human rights issue/conflict situation.

The second stage involves deconstructing the various narratives about the human rights situation. The commission helps to identify and address the underlying values and beliefs that influence cultural norms. The operation of entitlement and privilege is brought into the open and attended to. The conflict is externalized, so that it becomes viewed as separate from the individuals and groups involved, a phenomenon that can be named and dealt with. The commission assists all those involved to engage in anticipatory reflection on alternatives. This involves stepping outside the current mental models that restrict new insight and the potential for change.

The third stage is the reconstruction of the conflict narrative based on a new perspective that is shared by all those involved. The commission enables this formulation on the basis of human rights norms. A framework for further action both determines the specific outcome and builds in a prospective orientation that is a resource for the parties in the future. In effect, the framework prevents conflicts that the parties cannot resolve.

This general schemata is explored in greater detail with reference both to the complaints process established by human rights commissions and their equality-promoting functions.

5.2 Addressing Discrimination: The Complaints Process

This section examines how human rights commissions can facilitate a critical learning process about human rights norms within the complaints process. Two avenues are examined. The first is the utilization of transformative mediation practices within the current commission model of handling complaints. The second is an exploration of a new role for the human rights commissions in fostering critical learning review processes within the internal responsibility procedures of other organizations.

(A) Transformative Mediation

(i) An illustrative example⁸

A female technician, Ms.Roper has filed a complaint with the Human Rights Agency (HRA)⁹ alleging that she has been discriminated against by her employer, Westco, in that she has been denied access to training opportunities because she is a woman. The HRA carries out a preliminary review of the file and determines that it is within its jurisdiction. The complaint is assigned to a mediator and the parties are compelled to participate in one mediation session before any other options become available within the complaints process.

⁸This illustrative example has been developed on the basis of the examples used by Winslade and Monk in their description of narrative mediation. I have modified it to take into account the additional requirements of transformative mediation that I developed in Chapter 4, that is the employment of rights norms and the emphasis on the public nature of the conflict.

⁹I use the term Human Rights Agency to include both commission and tribunal functions as I work through this illustrative example in order to simplify it. Issues related to how mediation fits in with other aspects of the complaints procedures and which agency could have responsibility for specific aspects of the process are discussed in following section.

The transformative mediation process carried out to deal with this scenario is described in three stages: engagement, deconstruction and reconstruction.¹⁰ A brief comparative analysis is provided at the end of this section in order to underscore the unique features of the transformative mediation model.

a. Engagement

The mediator has a number of objectives during the engagement process: (1) establishing a relationship with each of the parties; (2) explaining how the mediation process will work; (3) inviting the parties to provide their story about the conflict; (4) explaining human rights policy¹¹ as it relates to the conflict; and (5) initiating a process whereby the parties to the dispute form an alliance against the effects of the conflict.

The mediator reviews the complaint and initiates the mediation process. She meets with each of the parties individually. The early phases of transformative mediation are highly structured. The mediator strengthens the quality of the engagement with the participants by clearly explaining the structure of the process and commits to ensuring that negotiated guidelines are adhered to.¹² The mediator's skills of engagement are especially important where mediation is mandated. In her early interactions with the parties, the mediator will have to actively defuse antagonism, address resentment about having to participate and deal with other forms of resistance.

Westco is not eager to participate in the mediation. The company would prefer to have the complaint dealt with through adjudication and initially suggests that their legal counsel participate in the

¹⁰The mediation process rarely follows the exact sequencing of any analytical stages or sequences ascribed to it in conflict resolution literature. Stages of mediation are best seen as background organizing frameworks for mediators to use in guiding their process.

¹¹I use the term human rights policy to refer generically to the relevant legislative provisions, precedents, commission guidelines or policy statements and so on.

¹²Winslade and Monk, at 65.

mediation process alone. The mediator takes steps to ensure that the right participants are involved. After some discussion, Westco reluctantly sends three representatives to meet with the mediator: Ms.Roper's immediate supervisor (who has the responsibility for recommending her for the training opportunities), the Director of the Department of Human Resources, and legal counsel.

The mediator explains the process and her role within it. She is responsible for ensuring that the process is fair to both parties and for ensuring that human rights policy is respected. She explains that she will have a number of discussions with the parties prior to the joint session.

The mediator invites the Westco representatives to identify the central difficulties that led to the complaint. The representatives describe Ms.Roper as a problem employee who does not fit in well at Westco. They explain that there is a lot of competition for the training opportunities. Training opportunities are based on a strict system of merit and Ms.Roper has simply not demonstrated her capacity to advance within the organization to date. In their view, this is a simple case of a disgruntled employee abusing the human rights complaint process.

The mediator conveys to the Westco representatives that she understands their views and their concerns without taking a position on them. In particular, she recognizes the limited number of training opportunities and Westco's interest in ensuring that the selection process is fair.

As in many conflict situations, both parties start off by blaming the other. Each party has a unidimensional, fixed and unyielding view of the situation.¹³ The mediator engages the Westco representatives to reflect on their own narrative by asking a series of questions designed to elicit more information about the conflict. These would include general questions about the nature of the selection process and the results in terms of whether the training opportunities were representative of the population or whether there were patterns of selection on gender differentiated grounds.

¹³This is what Winslade and Monk refer to as a "totalizing description."

The Westco representatives' responses make it clear that no woman has ever been selected for training leading to advancement to the next level. In fact, while there is a growing number of women at Ms.Roper's level, no women has been hired or promoted to any more senior positions within the company. Westco also expresses concerns about Ms.Roper advancing into an all-male division given that she would not be welcomed by her colleagues. Following up on this point, the mediator invites the Westco representatives to elaborate on their concern for Ms.Roper which seems to contradict somewhat their initial assessment of her as a troublemaker. In response to these questions, Ms.Roper's supervisor describes the positive contributions that she has made at Westco.

At this stage, the mediator would introduce the relevant human rights policy concerning systemic discrimination in the workplace and the employer's duty to take steps to address it, including scrutinizing workplace rules to see if they had unintended consequences of discrimination. She would note, for example, that employer's have a duty to "build conceptions of equality into workplace standards".¹⁴ The approach taken by the mediator is not to tell Westco how to apply the policy nor to evaluate Westco practices against the policy. Rather, human rights policy is presented as another element of the narrative that will be part of the conversation during the mediation process.

The introduction of the relevant human rights policy helps to create space for an alternative description of the complaint. The mediator is careful in her choice of words, for example by referring to the conflict as "this problem" and not "your problem". She initiates the process of externalizing the conflict by not identifying "the problem" with either Ms.Roper or Westco.

The mediator then meets in a private session with Ms.Roper and her legal counsel. The same process is followed. Ms.Roper expresses her total disillusionment with her employer. She has worked very hard and has received excellent reviews, but is not getting the recognition or promotion she deserves. She refers to the poisoned nature of the workplace including the prevalence of sexual innuendo which she finds disconcerting. Ms.Roper's narrative illustrates how when people feel hurt

¹⁴*BC v. BCGSEU*, at para.68. See discussion in Chapter 2, section 7.3.B.

they tend to reinforce their own sense of injustice, betrayal, victimization and mistreatment. Again, the mediator demonstrates that she understands Ms.Roper's concerns by paying close attention and by the skilful use of active and reflective listening.

The mediator asks questions to flesh out the history of the problem, inviting Ms.Roper to name when it began and to trace its development. In making these inquiries, the mediator is particularly attentive to experiences that stand outside of the conflict, such as positive aspects of the employment relationship. Ms.Roper talks about the optimism she felt upon being hired by Westco and recognizes that some steps had in fact been taken by the company to deal with some of the problems encountered by women on the job site.

The mediator also discusses human rights policy with Ms.Roper in the same manner as with Westco. Ms.Roper has framed her complaint in terms of discrimination. However, rather than assuming that she knows what Ms.Roper means by this, the mediator seeks to establish the contextual significance of equality norms from Ms.Roper's perspective.

The process of narrative construction is highly participatory. The mediator's focus is not to sift through the facts in an attempt to get agreement on them. Rather, she validates the narratives through which people experience the conflict and then seeks out points where the story might incorporate alternative perspectives.

Through the engagement phase of the mediation process, the mediator has achieved a number of objectives and set the groundwork for the next stage.

First, the mediator has started to create conditions that foster understanding, respect, cooperation and trust. These conditions are built through relational practices, particularly through the mediator's careful and respectful listening and responses to what she has heard. At all times, the parties are spoken to as if their intentions are worthy. These steps open the door to building trust which continues throughout the process. Although conflict tends to push relational attitudes of understanding, respect and cooperation aside, a mediator conveys early in the engagement process

a desire to seek them out again and promotes their expansion. She steers the parties away from concentrating on finding fault and toward developing ways of speaking that invite relationship repairing and rebuilding, or at a minimum promote a respectful encounter.

Secondly, the mediation process has begun to open up space in the conflict stories. At this stage, the focus is not on narrowing issues but on broadening them in order to create potential for resolution. Both parties are invited to reflect on the positive dimensions of the employment relationship as well as the problematic ones. The mediator has encouraged the parties to view the problem as external, one that is not identified with either party. She has encouraged the parties to enrich their stories by drawing out a lot more information and context about the employment situation surrounding the conflict. This detailed knowledge will assist the mediator and the parties as they move toward resolution.

Thirdly, already in the initial sessions, the mediator has begun to co-author with the parties an alternative non-problem bound narrative that could serve as the rudimentary stage of a resolution to the problem. This includes an alternative account of the way the parties have worked well together. In addition, by introducing human rights policy, the mediator has provided a normative reference point for the construction of an alternative.

The parties to the complaint are viewed right from the start as partners in the mediation. They are respected because they possess local knowledge and expertise that can contribute to the resolution.

The narrative process employed in this transformative mediation model is concerned with unearthing the competencies and resources of the participants in a respectful manner.

b. Deconstruction

The second stage of the mediation process involves a reflective scrutiny of the narratives presented by the parties at the outset. This is referred to as "deconstruction" because the mediator works with

the parties to understand the impact of dominating discourses on the issues with which they have to contend. More specifically, this involves reflecting upon the taken-for-granted assumptions that each party has about the conflict and potential resolution.

The goals during the deconstruction stage are: (1) to assure that parties have what they need to participate effectively in the joint mediation session; (2) to further develop the externalized description of the conflict; (3) to deal with the implications of structural inequality and power imbalance that shape both the conflict and the potential for resolution; and (4) to lay the groundwork for the construction of an alternate story.

The mediator holds another set of private meetings with the parties. Much of the work of transformative mediation is accomplished at separate meetings. This is because people are much more willing to explore the issues freely when they are not under the scrutiny of the person with whom they are in conflict.¹⁵ In these meetings, the mediator works carefully with each party to construct a frame of meaning around the problem issue. It is also in these sessions that the mediator builds her relationship with the parties. The private sessions are the venue for significant developments in the mediation as a whole that affects in a major way what happens when the parties are brought together.

The mediator meets with the Westco representatives and gains their agreement to refer to the complaint as "the training problem". This cements the process of separating Ms.Roper from the problem. She uses this term consistently and invites Westco to look to the effects of "the training problem" from the past, present and future perspectives. For example, she asks "what effect has this training problem had on the employees? on management? on morale?" and so on. This leads to a new perspective on the problem and positions the parties as the victims of "the training problems"'s actions rather than as either victim or perpetrator in each other's eyes.

¹⁵Winslade and Monk, at 80.

The mediator takes steps to disarm the conflict by curious questioning.¹⁶ The aim of this questioning is to break up Westco's sense of certainty that they know all that can be known about "the training problem." For example, she asks about what Westco has in mind when it uses the term "merit" and its role in "the training problem." She is fairly persistent in this regard making further inquiries that pick up on points that Westco raises and explores the background norms that have helped to construct their perspective. This includes questions such as: "As you speak about merit, I wonder what has influenced your thinking on this issue? What background stories have you drawn on in saying that?"

At this stage, the mediator explicitly recognizes how gendered constructions have shaped the conversation to date. She takes an overt position against sex discrimination.¹⁷ She is able to do this in a way that does not alienate Westco because of the relational sincerity that she has conveyed to that point. Westco has begun to move into partnership with her to resolve the dispute. The mediator avoids saying anything that could be perceived as judging or blaming Westco for unjust behaviour.

In her approach, the mediator focuses on how background cultural norms and the operation of structural inequalities influence our perceptions and actions. She talks about how discourses of entitlement can restrain a person's ability to demonstrate fairness and equity in dealing with others. She emphasizes the ways in which we are all limited by the available discourses in society. Needless to say, this would be much more difficult to achieve in a joint session.

The mediator invites Westco to consider the potential role of equality norms in "the training problem." She also introduces other more equitable models of practices and policies relating to training and advancement within companies of a similar size to Westco. Presenting these alternative

¹⁶For a discussion of the way curious questioning works see, Winslade and Monk, at 78-9, 123-30.

¹⁷According to Winslade and Monk, narrative mediators may state openly their opposition to violence, racism and sexism. (at 101) This responsibility is even clearer in the human rights context where the mediator is responsible for upholding human rights legislation.

is an important part of the critical learning process.¹⁸ Engaging in a conversation about preferred experiences that lie outside of the domain of the problem opens up new possibilities that can lead to resolution.

The mediator asks a series of questions about how and why Westco's approach to training was developed and invites Westco to change their view of their behaviour and policies in significant ways. For example, she asks them "Do you want a workplace that is consistent with human rights norms? How important is it for you that your relationship with employees is an equitable one?" The process of asking and answering such questions begins to unravel the tightly coiled, taken-for-granted reality that Westco held at the outset of the mediation.

She also encourages Westco to take a longer term perspective by examining the personal and material costs of having "the training problem" continue over a period of months or years. Momentum and volition toward resolution is built by inviting Westco to consider the negative effects of the problem.

At this stage, the mediator involves other related parties affected by the conflict. In this case, this could include other co-workers and managers. The introduction of other voices and perspectives adds to the understanding, mapping the effects of the conflict and helps to point the way to potential resolution. For example, the mediator could facilitate a conversation about "the training problem" that includes a discussion of equality norms with all interested individuals at Westco. Or she could accomplish this through individual conversations with other affected parties at Westco. The goal is not "fact finding" but rather to further map the effect of the problem, identify the operation of preconceived notion and explore descriptions of a preferred future employment relationship.

¹⁸This approach follows the "news of difference" technique elaborated by Gregory Bateson, *Steps to an Ecology of Mind* (New York: Ballentyne Books, 1972). He proposes that learning takes place when people can detect new information as a result of comparing one set of events with another.

In her second meeting with Ms.Roper, the mediator seeks her support for referring to the issues as "the training problem." Ms.Roper concurs. This is an important step as when both parties agree to a renaming of the problem it results in an important change in the dynamic. Instead of being squared off against each other in stance of opposition, the parties are realigned together against the problem.¹⁹ The mediator follows up on this agreement by inviting Ms.Roper to consider how the conflict oppresses both parties. This helps to destabilize the negative motivations that she ascribes to Westco. This destabilization creates space for alternate stories and potential resolution to develop.

In this session, the mediator's main focus would be to ascertain whether the complainant feels prepared and supported so that she can participate fully in the joint session. While Ms.Roper is feeling more positive based on her participation in the initial meeting, she still has some concerns. She talks about how Westco is a powerful company and has much more information at their disposal. She is also worried about being intimidated by her supervisor during the session and about potential reprisals. The mediator provides additional information to Ms.Roper and discusses with her measures that can be taken to ensure a balance during the session. The mediator seeks out Ms.Roper's views about what aspects of the setting and structure of the interaction are important to her.

The mediator asks Ms.Roper to theorize about her own experience and what may be helpful to do next. The mediator also provides Ms.Roper with the same information about equality norms and alternative policies and practices relating to training and advancement that she provided to Westco. These alternative stories assist Ms.Roper to feel less isolated and provide her with greater resources for the joint session.

At the end of these sessions, the mediator sends a letter to both parties describing the achievements to date and setting out the structure and format for the upcoming joint session. Written documents play an important role in facilitating change. They serve not just as agreements but also as

¹⁹Winslade and Monk, at 147-8.

milestones or signposts throughout the mediation process: "written agreements are tools for ongoing narrative development rather than simply the goals of the process."²⁰ Letters written by the mediator to parties at various stages in a mediation process can play a crucial function in securing progress and preventing slippage back into the conflict story between meetings. In addition, the written word tends to get counted as trustworthy knowledge.²¹

In her letter to Westco and Ms.Roper, the mediator does the following:

- incorporates externalizing language by confirming the agreement to refer to the complaint as "the training problem";
- extends the relational realignment of parties by emphasizing the negative impact of "the training problem" on both the parties;
- acknowledges the best intentions of both parties to resolve the problem and implicitly invites each party to join her in acknowledging the best intentions of the other party;
- summarizes the influence of the problem on the parties;
- sets out the positive aspects of the employment relationship;
- notes the impact of the wider social discourses of sexism and gendered cultural norms on "the training problem";
- reinforces process agreements for the joint mediation session; and
- sets out the main issues to be discussed at the joint session.

In the deconstruction process, the mediator has made visible the operation of gendered cultural practices within the workplace and created space for the development of alternative approaches. She has continued to build trust and a cooperative and respectful relationship with the parties. The externalization of the conflict as "the training problem" has realigned the parties and opened the door for a joint approach to resolution.

²⁰*Id.*, at 228.

²¹White and Epton, *Narrative Means to Therapeutic Ends*, at 37.

It should be noted that the mediator has not yet asked questions about outcome. In transformative mediation, the approach is to avoid steering the conversation toward outcomes too early because the parties may be reluctant to expose their opinion overtly before sufficient trust is built in the process. Deconstructive questions seem more likely to develop this trust than a rush to a negotiation over outcomes.²² Deconstruction often leads to more preferred options becoming available to the parties.

c. Reconstruction

The goal of the reconstruction stage is to develop an alternative joint narrative that is consistent with human rights policy. At this point, the mediator convenes a joint meeting of the parties. She has tried to pre-empt problems by preparing carefully for the joint meeting. At the outset, the mediator reiterates the rules and assumptions that underlie the process. Each party has the opportunity to greet and acknowledge the other party.

The mediator invites the parties to make a brief presentation providing their current view of "the training problem". Based on the work that the mediator and parties have done together to prepare for this session, the parties have become more flexible in interactions. Ms. Roper talks frankly about the negative impact of "the training problem" on her in very strong terms and expresses her perception of its broader impact at Westco. She also acknowledges that Westco has taken some steps to improve the situation.

The mediator suggests that at this initial stage, Westco has the opportunity to talk about "the training problem" on its own terms and not simply respond to Ms. Roper's views. Westco acknowledges how its views have evolved from the beginning of the mediation. The representatives acknowledge how background cultural norms have shaped the views on training and advancement within the company.

²²Winslade and Monk, at 76.

The mediator pays close attention to both parties throughout this exchange. One of the important assumptions of transformative mediation is that the act of being an audience to someone else's speaking is an important part of the process of constructing meaning.

Following these initial presentations, the mediator asks each party whether they want to achieve a resolution along the following lines:

We have been talking for a while about the effects of this dispute on both of you, and even a little about the dents you have managed to make in it so far. I was wondering though, what you are thinking about where this is taking you. Do you want a future in which this dispute continues to exert this influence, or would you prefer to change the way things are going?²³

While this may seem obvious, not all parties want a resolution. This expression of preference for a different and conflict-free description of their relationship is an important starting place for reconstruction. While the parties may have thought about it privately, the act of making this statement explicitly in front of the mediator and the other party makes a difference. In this case, both parties answer positively, and the mediator registers that a "situation of agreement" has been reached. This signals a new stage in the mediation where movement toward agreement begins.

The desire for things to be different is not enough to help facilitate change and so the conversation shifts to steps that need to be taken toward resolution. The mediator solicits alternatives by directly asking the parties questions that draw out various elements of what is required to address "the training problem" and monitor change.

Westco proposes developing a new training and advancement policy. The representatives also suggest that Ms.Roper could be placed at the top of the list for training sessions. Ms.Roper expresses some concerns about how this would work and insists that the process for developing the policy be fully participatory. She would like to make sure that she is offered a training position within a specific period of time, say in the next six months.

²³*Id.* at 155.

The mediator works with parties to further develop these alternatives. At each stage of the conversation she focuses on the degree of agreement, by asking questions such as: "What do you think it means that you are agreeing about that issue? How significant is it to you that she is willing to cooperate on your request?"

The mediator shifts the focus toward the future and concrete steps to advance cooperation. At this stage, the parties start to interact in a more adversarial manner, reverting to traditional patterns of interruptions and recriminations. The mediator acts quickly to engage the parties in finding an alternative way to interact. The pattern of defensive reacting is interrupted as they discuss this process issue. At Westco's suggestion, the parties agree that the mediator will have an opportunity to speak after each party has spoken and before the other responds. This way the parties can listen more attentively without the distraction of feeling compelled to respond immediately. A more reflective conversation is reasserted in which interruptions do not dominate and the participants have more room to speak their minds. As the conversation continues, the mediator frequently checks with both parties to ensure that the mediation session is on the right track.

As agreement in principle is reached on the two main issues of the general policy and a specific training program for Ms. Roper, the mediator seeks to anchor this reconstruction into the broader audience at Westco. She asks questions such as: "what difference would introducing more cooperation into the situation, as you have been proposing, make to your other staff? Who will be most likely to support the continuation of these developments?"

The focus of the reconstruction stage is on addressing the relational issues, that is the development of a cooperative attitude and respect and greater understanding of equality norms and their application in the employment relationship. The outcome is thus best seen as a general framework for resolution.

The mediation process works to uncover transformative possibilities within the conflict. Rather than taking interests as a given, they are seen to be developed through a renewed understanding of the

relational context between the participants. Transformative mediation contributes to "the conscious reshaping, albeit in some small way, of the discourses out of which needs and interests are produced."²⁴ The "outcomes" are the grounds upon which new more equitable basis for interaction among parties is built.

The specific outcomes can be negotiated by the parties within this new framework. In this case, agreement is reached on a process for establishing a new procedure for selecting employees for training opportunities and principles that are consistent with human rights norms to guide both the process and the ultimate selection procedure. The agreement stipulates that the procedure will include an informal mechanism for dealing with problems that arise in its application. Details regarding Ms.Roper's access to training opportunities are also agreed upon.

The mediator helps the parties to put strategies, techniques and problem-solving abilities into place. A written agreement documenting the resolution is drafted collaboratively. This underscores the agency of the parties and their responsibility for the agreement. The door remains open for the continued involvement of the mediator if more assistance is required as the parties move toward implementing the resolution.

The narrative approach upon which transformative mediation is founded can shorten considerably the negotiation phase of mediation "because it engages people in negotiation from a place of greater willingness".²⁵ Rather than seeing the negotiation of outcomes as restoring the relationship, the relational context itself is addressed as a site for narrative development and the settlement negotiation is treated as a natural outgrowth of that context.²⁶

²⁴*Id.*, at 134.

²⁵*Id.*, at 90.

²⁶*Id.*, at 205.

d. Comparative Analysis

This example illustrates the difference between the transformative mediation model and other forms of mediation commonly used by human rights agencies. At present, the mediation of human rights complaints seldom achieves a true resolution of interests much less transformative change. Transformative mediation has the potential to achieve this broader objective because it changes the dynamic between the parties leading to a jointly-developed view of how human rights norms should be defined and applied in their situation.

Settlement mediation and evaluative mediation take the parties' positions as a given and assist the parties to achieve a compromise within the framework of human rights legislation. In the example set out above, this would mean that a mediator would focus on the original parameters and specifically on Ms. Roper's training opportunities. In contrast, transformative mediation assists the parties to transform their interests. This is accomplished by creating an openness and reasonableness that is not apparent at the outset of the mediation session. The mediator models relational practices thereby developing a strong relational and respectful process. Nowhere in this alternative account is there a focus on having either party offer a compromise, that is give something to get something in return.

The outcome of a transformative mediation process can not be predicted at the start. It is not a straightforward mechanical application of human rights norms as is undertaken in evaluative mediation. The whole focus of transformative mediation is on the potential of "unique outcomes," that is, ones that do not flow directly from the conflict narrative. The parties themselves interpret and apply human rights norms in the context of resolving their conflict. Often rather than being settled, the dispute starts to "dissolve" as the discursive conditions that have supported it are weakened. Thus, change resembles dissolution rather than solution.²⁷

²⁷*Id.*, at 183.

At a superficial level, there are some similarities between problem-solving mediation and transformative mediation. However, there are also some important differences between the two. Most importantly, in contrast with the instrumental focus of problem-solving, transformative mediation focuses on the relational context.

The problem-solving model, like most existing mediation models privilege substantive issues and sideline relational ones.²⁸ Transformative mediation addresses relational issues in preparation for settling the substantive issues. This is a preferable approach because unless relational issues are addressed, the resolution can unravel. In addition, a more satisfying and long lasting resolution to problems occurs when mediators pay attention to promoting respectful engagement between the parties.

Transformative mediation is particularly well-suited to ongoing relationships. However, this approach is also valid where the relationship ends before the mediation begins, for example where an employee has been terminated or has quit before the complaint can be addressed. In these situations, the mediator still will need to pay attention to relational issues that resulted in conflict in order to assist the parties to resolve it. The complainant benefits from this approach because of the enhanced quality of process and outcome that arises from the fact that transformative mediation deals with the conflict in a more holistic way. The emphasis on relational context also promotes learning for future situations. This prospective approach is important since, to follow the example cited, all employers will have future relationships with employees and most individuals will be employed again in the future.

The focus on the "problem" is very different in the problem-solving and transformative approaches. In problem-solving mediation, the "problem" is internally-defined and conflict is seen to result from a clash of several internally-defined problems based on human needs or interests. In transformative mediation, the "problem" becomes defined externally. The spirit of this approach lies in the

²⁸Other models focus on process at the expense of substance or relational issues. The narrative model addresses all three as integral aspects of the conflict resolution process.

aphorism "the person is not the problem, the problem is the problem."²⁹ This approach is grounded in a belief about the nature of human problems that is different from the one that dominates most psychological, legal and lay discourses.³⁰ Problems are seen to arise from discourse, rather than from the expression of human needs.

This understanding is emphasized during the mediation process where the problem becomes seen as "a third party to the dispute".³¹

A problem-solving mediator would internalize the effects by asking

"How do you feel about what happened?" A transformative mediator would ask: "How does what happened invite you to feel?" The impact of the problem is no longer seen as automatic or inevitable because the individual realizes that "if the problem got me thinking in a certain way, then maybe another way of thinking is possible."³² This realization is at the core of the transformative possibilities within this model of mediation.

Like the narrative mediation approach upon which it is based, transformative mediation is a conflict resolution process not a counselling or therapeutic one.³³ However like many models of therapeutic mediation, transformative mediation makes more room for the recognition and acknowledgment of the personal impact of conflict by comparison with other models employed in the legal system. The mediation process does not have "an intransigent task focus" rather it makes room for a personal

²⁹M. White, "The Externalizing of the Problem" *Selected Papers* ed. M. White (Adelaide: Dulwich Centre Publications, 1989), cited in Winslade and Monk, at 155.

³⁰*Ibid.*

³¹Winslade and Monk, at 144.

³²*Ibid.*

³³Winslade and Monk explain this point in these terms: "The change process relied on is not based on entering more strongly into feelings and venting them in a cathartic way, rather, change is possible through the construction of alternate stories, that is at the discursive level and is more efficient than individual cathartic expression of feelings or needs." (at 151).

dimension.³⁴ Many people find it dissatisfying to participate in an impersonal process that ignores these dimensions. It can be perceived as dehumanizing and insulting.³⁵ Much of the discussion about personal effects takes place in the separate meetings with the parties, however acknowledging these non-cognitive dimensions of the conflict can also make a big difference in joint sessions.³⁶ A narrative mediation model that has recently been implemented by the Massachusetts Commission Against Discrimination(MCAD) promises to be faster than current practices.³⁷ One of the alternative or additional options offered by MCAD for human rights complaints is a Truth and Reconciliation Commission Model. It is based on the theory that reconciliation, acknowledgement and an apology will "restore the dignity of the victim" in some cases.³⁸

Certain complainants who seek a variety of non-monetary damages, such as apologies, and who are particularly interested in experiencing restorations of their dignity are able to opt to participate in this process. They do so by choosing this option on the intake form. If the respondent agrees to participate, then an informal mediation process is facilitated by the Chair/ Commissioner of MCAD.

Parties are not required to involve lawyers, but can do so.³⁹ If an agreement is reached, it is not approved by MCAD nor is MCAD a party to it. Rather, the parties withdraw the case and the Chair will encourage parties to file the agreement with a court, so that parties could go to court to have it

³⁴*Id.*, at 151.

³⁵*The Cornish Report*, at 22.

³⁶Winslade and Monk, at 151.

³⁷This description is based on the description in Jamie Wacks, "A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories" (2000) 7 *Virginia Journal of Social Policy & the Law* 195, at 244-249. Wacks's research includes an interview with Charles E. Walker Jr. Commissioner-Chair of the MCAD in October 1999 and an unpublished paper by Charles E. Walker Jr., *Reconciliation Remedy: A Model for Dispute Resolution* (October 1998) which was developed on the basis of focus group discussions. This is the only example of narrative mediation in a human rights context that I am aware of.

³⁸*Id.*, at 245.

³⁹In other mediation and arbitration procedures offered by MCAD parties must be represented by legal counsel in order to participate. This is one measure the MCAD takes to ensure fairness. Thomas Kochan, Brenda Lautsch and Corrine Bendersky, "MCAD ADR Program Evaluation" paper presented in Vancouver, June, 1998.

enforced should either party breach it. The result is still a legally enforceable settlement but one that is without MCAD approval. The objectives of the Truth and Reconciliation Model are both to ease the regular caseload but also to restore dignity and provide an apology to individuals who have been harmed and feel wronged. No details about the nature of mediation undertaken are provided.

The transformative mediation approach developed in this paper on the basis of Winslade and Monk's model of narrative mediation has a much broader application than the approach taken by MCAD to date. The two share the emphasis on the importance of the narrative form and the importance of acknowledging the experience of the other party. However, the transformative model is not limited to a small class of cases nor is it focused on individual reconciliation and limited remedies.

The model of the transformed developed in this thesis to be applied in the human rights context is just that, a model. At this stage, its strengths and weaknesses can only be judged in the abstract. This model has been built with a view to overcoming the limitations of current practice as outlined in the previous sections. It is in essence an ideal type. However, the fact that this model departs in some at dramatic ways may be cause for concern. In particular, the substantive role of the mediator, the linking of individual and systemic aspects of the human rights conflict and de-emphasis on settlement are all aspects that challenge current views on appropriate mediation process.

For example, one of the main questions that arises in this analysis is the amount of time required by the transformative approach in comparison with current mediation practices. Transformative mediation requires an expanded sense of time, in that there has to be enough time between the mediation sessions in order to facilitate learning and reflection. However, it may not actually require more time and resources from the human rights agency than do current approaches. This is especially true if the mediation process is seen as an alternative to the current combined investigation/conciliation approach.⁴⁰

⁴⁰Under this model, commissions would not be involved in investigation. Complaints would either be dealt with through: early resolution (prior to complaint); through mediation; or through adjudication where information gathering and exchange is the responsibility of the parties assisted by strong, tribunal-enforced disclosure requirements. The idea of a mediation report being provided to the tribunal where mediation fails to resolve all is not consistent with

Transformative mediation is a "front-end" heavy process, but even when it fails this is not likely to be wasted time since the investment in fostering trust and building a relational context could facilitate other resolution processes. Currently, people are conditioned by expectations about adversarial processes that shape cultural views of justice. As a result, transformative mediation will require more time when it is first implemented since it will take longer for parties to adjust to and build trust in an innovative process. This effect should diminish over time as a greater understanding of transformative mediation develops and the culture of human rights practices changes. While only "repeat players" will have direct experience with this model, growing awareness of this approach by lawyers and others will help to foster cultural change.

An assessment of the potential of the proposed transformative mediation model will depend to a large extent on the basis for analysis. If the measure is to be a mediation process that mimics the current legal model or current practice then this model is certain to be found wanting. However, the starting point here is that existing models can not fulfil the mandate of human rights commissions as change agents. The objective has been to develop a mediation model that has a greater potential to transform the conflict by assisting parties to define and apply human rights norms through a process that is more akin to a learning process than to an exchange. The transformative mediation model is thus consistent with the existing roles and responsibilities under human rights legislation even though the proposed process is a novel one in this context. The practical application of this model is explored in the next section.

(ii) Mediation policy and institutional design

The transformative mediation model is a radical alternative to existing mediation practices in the human rights context. As a result, careful thought should be given to how to implement this model. Initial steps could be taken to implement transformative mediation on an pilot project basis,

the transformative approach unless this approach is agreed upon by the parties. Mediation reports can be used as a form of coercion. See for example, M.W. Duas, "Mediating Claims of Discrimination - The Experience of NYC's Human Rights Commission" (1995) *Dispute Resolution Journal* 51.

including a principled evaluation process. This section sets out an initial description of a transformative mediation policy and related institutional design issues. This discussion assists in both further clarifying the model and comparing it to existing practice.

a. Policy statement

At present, most human rights agencies set out their mediation policy in general terms with a very limited or non-existent qualitative description of the process. Policy goals are most often set out in reference to increased efficiency. Any decision as to appropriateness of a given model of mediation is value-based. Thus a policy statement is founded on the values to be advanced through mediation.

Transformative mediation policy requires a conscious and reflective statement about the goals and approach taken in this conflict resolution process. There should be clear links to the general mandate of human rights agencies to promote equality. This policy statement could include the following elements:

- a fair process leading to a resolution of the conflict that protects and promotes the public interest in equality;
- a process that pays attention to the relational context and addresses power imbalances and the operation of privilege;
- a process that develops the linkages between individual discrimination and structural inequalities;
- a process that is inclusive of the various perspectives affected by or interested in the conflict;
- a resolution and outcomes that are prospective, address systemic discrimination and advance the interpretation and application of equality rights norms in the context of the conflict; and
- transformative mediation is one of several conflict resolution methods provided by the human rights agency.

Elements of a transformative mediation policy can be further elaborated in relation to questions of institutional design. The following elements are discussed: the fairness enhancing function; the norm-advocating function; the public interest function; the mediator's role; and, a multi-option system.

b. Fairness Enhancing Function

Transformative mediation has an important fairness enhancing function in context of human rights conflict. The strength of mediation is the fact that it is loosely structured and flexible, permitting mediators to shape the process to the particular dynamics of cases and parties. This tailoring to the circumstances and interests is an understanding of fairness that competes with the rigidity of the adjudicative model. Mediation can accommodate the vastly differing needs and styles of disputants. This flexibility promotes rather than conflicts with fairness.

While recognizing the importance of flexibility, it is also crucial that a mediation policy explicitly set out procedural fairness guidelines. The conception of fairness is quite different in mediation as opposed to adjudicative processes. Within the transformative model, procedural fairness is guaranteed by: providing parties with due notice; following clear, established and accountable procedures; ensuring the full participation by all affected parties; promoting respectful mediation encounters; actively being aware of and dealing with power imbalances; ensuring privacy; performing follow up; and deterring reprisals and/or malicious claims.⁴¹

One of the most important ways that transformative mediation enhances fairness is by directly addressing power imbalances and entitlements. As noted before, the mediator must be highly aware of, and pay close attention to, entitlements within the process and structural inequalities that

⁴¹Based on Mary Rowe, "An Effective, Integrated Complaint Resolution System" in B.Sander and R. Shoop (eds) *Sexual Harassment on Campus: A guide for Administrators, Faculty and Students* (Toronto: Allyn and Bacon Ltd. 1997) at 210-13.

influence the process through background social norms. She must be prepared to directly intervene to address these dynamics.

Transformation mediation policy must deal with power imbalance in a comprehensive rather than a rhetorical way. One commentator sums up these features in this way:

The main elements, I argue, are a flexible process with good faith participation (whether initially consensual or compelled) backed up with fixed entitlements for those who society has placed in a systematically weaker position, with access to effective assistance of counsel, which provides satisfaction to users, is accountable to users and the public and is administered by those who have good awareness and understanding of the nature of bias against women [and other marginalized groups].⁴²

Many court rules and guidelines for mediators create specific standards for the mediator's function with respect to power imbalances. For example, the Rules of the Supreme Court of Hawaii provide that the mediator must educate the parties about the process, be certain that they have enough information to understand the benefits and risks, encourage legal consultation, and raise with the parties problems of fairness, equity and the feasibility of the proposed options for settlement. Other rules place similar obligations on mediators.⁴³

Transformative mediation policy should contain specific guidelines on the mediator's role in addressing power and privilege within the resolution process. An additional safeguard for participants is provided by access to legal counsel. While the emphasis in transformative mediation is on direct participation by the parties within the resolution process, lawyers will continue to have an important, even if a more supportive, role in assisting the parties and enabling them to fully participate in the process. The transformative mediation process changes the requirements of

⁴²Mack, "ADR and Access to Justice for Women", at 133.

⁴³The Iowa Supreme Court has standards similar to the Hawaiian rules. In addition, this Court's rules state that financial and factual disclosure in the mediation of family law disputes should be the equivalent to that of the discovery process, unless "intelligently" waived. Further, the Iowa lawyer-mediator "has a duty to assure a balanced dialogue and must attempt to defuse any manipulative or intimidating negotiation techniques utilized by either of the participants."

advocacy from the traditional representational role to a collaborative one. As such, implementation of this model will require further changes in the legal culture some of which have already been initiated by the ADR movement.

c. Norm-Advocating Function

Models of mediation embrace a number of different approaches to the role of norms within the resolution process. Transformative mediation integrates the entire schema of norm-educating, norm-advocating and norm-generating functions. The mediator plays an important role in educating the parties about human rights norms and advocating their use in the reconstruction of the relationship and the specific outcomes. This is one of the ways that the transformative mediation model is different from the narrative model that underlies it.

At the same time, the mediator is actively seeking out transformative opportunities and innovative interpretation and application of these norms in the context of the specific conflict. Mediation can result in just outcomes that are defined by the parties themselves. This broadens the potential for substantive fairness rather than restricting it to existing legal approaches. Mediated outcomes may be particularly important in the human rights context where legal norms are in a rapid state of evolution.

Human rights principles can be created and not simply applied through mediation. This potential is enhanced by the emphasis placed in transformative mediation on the relationship between individual conflicts on issues of discrimination, structural inequalities and systemic repercussions. In this way, transformative mediation can lead to the generation of more refined equality norms and therefore make contributions that are comparable to test cases in litigation.

d. Public Interest Function

Human rights commissions have a mandate to mediate human rights discourse within the public sphere. Existing models of mediation deal inadequately with the issue of the public interest.⁴⁴ These inadequacies have been further hindered by the judicial construction of the human rights commissions' role in this regard.⁴⁵

Transformative mediation policy directly recognizes the public interest in the conflict resolution process and outcome. In addressing discrimination through the complaints process, the mediator has a role to protect and promote the public interest in creating equality. One of the ways that the mediator fulfils this function is by emphasizing the public nature of the process. For example, by taking steps to ensure that all affected and interested parties have the opportunity to have a voice in the mediation process.

Transformative mediation policy recognizes that the mediator is a public steward with a mandate to promote equality norms and ensure that mediated outcomes comply with the spirit and intent of

⁴⁴The term public interest is used in this thesis in two senses. First, it is proposed that there is a generalized public interest in human rights issues which extends beyond the interests of the parties and that legal institutions have a responsibility to ascertain, protect and promote this interest. To some extent the public interest is discernable from human rights norms themselves as they are set out in human rights legislation, the Charter and international human rights documents. Furthermore, changing approaches to a general public interest to a given human rights norms can be developed and coalesce through interaction in the public sphere.

In addition, there can be distinct public interests with respect to a particular conflict. These distinct interests arise on the part of groups that will be affected to a greater or lesser degree by an outcome on a particular human rights questions. Accommodation must be made to ensure that both general and particular public interests have an appropriate voice in all types of conflict resolution processes, including litigation. The latter point is discussed in Chapter 6.

⁴⁵In *BC Human Rights Commission v. BC Human Rights Tribunal* 2001 BCSC 721, the BC Supreme Court upheld a BC Human Rights Tribunal decision that the Deputy Chief Commissioner of Human Rights(DCC), who had been added as a party to a hearing, could not require the Tribunal to proceed with the adjudication of a complaint that has been resolved by settlement to which the Deputy Chief was not a party (*Shannon v. BC(Minister of Government Services)*, 2000 BCHRT 52). In construing the legislation, the Court held that the public interest could not continue the claim once the private interests has been settle, because the addition of the DCC as party did not result in the creation of a complaint initiated by him. However, the Court did note that the DCC was afforded more substantial rights to pursue an independent claim under another provision of the Code. It remained open to the DCC to initiate its own complaint on the issues originally raised by the complainant. The Court did confirm that "there is a private and public aspect to the issue of human rights" and the "human rights legislation attempts to reflect and promote both the private and public aspects of human rights." (at para. 36).

human rights legislation. This proactive role suggests that there is a diminished requirement for commission approval or separate commission participation within the process. The mediator should be empowered to end a mediation if a the public interest is not being respected, although as in all situations, the parties retain the right to settle privately. The policy should also recognize that in some cases, where the mediator is unable to ensure the promotion of the public interest herself, the commission may participate as an additional party or "voice" within the mediation process.

Transformative mediation policy must also balance the public interest and the private interests of the parties. The two can be quite distinct in some instances. For example, several studies have shown that the chief interest of complainants in sexual harassment cases is in a speedy, private resolution. Although secondary interests include preventing the behaviour in the future and protecting others from similar incidents.⁴⁶ The mediator should inquire into and respect the individual complainant's interests in terms of confidentiality and limited participation in the systemic aspects of a claim. The process can take into account the complainant's wishes in this regard by making the commission a party for the purposes of the broader aspects of the claim thereby limiting the complainant's role to her own interests.⁴⁷

One of the concerns about informal methods of resolution by comparison to adjudication is that information about the outcomes is not made public. Private settlements can harm the public interest by precluding group empowerment and public scrutiny, thereby frustrating the goal of public education:

If the outcomes of complaints were more widely known, people would have a better

⁴⁶M.P. Rowe, "People Who Feel Harassed Need a Complaint System with both Formal and Informal Options" *Negotiation Journal* (April, 1990) 161 at 162.

⁴⁷However, the complainant should be afforded the opportunity to participate in all aspects of the mediation process. An individual's view on her interests may change during the process and these changes should be accommodated.

understanding of their rights, respondents would have a better understanding of the legal obligations imposed on them, and an individual with a strong claim would have the bargaining power commensurate with the strength of her claim.⁴⁸

While transformative mediation policy need not require commission approval of resolutions, it should require that the mediator report back to the commission on the mediation process.⁴⁹ This approach can inject transparency and accountability into the process. The commission would compile this information and make it available to the public. The policy can protect the privacy interests of the parties by providing that dissemination of this information will not identify the parties where confidentiality is requested. This approach provides the commission with the capacity to gather statistics and other forms of information and monitor trends. This information can assist the commission in its equality-promoting function by, for example, assisting in the development of general guidelines or policy statements.

e. The Mediator's Role

The transformative mediation policy should contain a statement on the mediator's role. Elements of this statement include:

- the mediator is a public steward responsible for the protection and promotion of human rights policy;
- the mediator is impartial and is responsible for ensuring a fair process;
- the mediator has a duty to educate the parties and advocate for human rights norms within the process;
- the mediator has a duty to address all forms of inequality in the process; and
- the mediator is accountable to the parties and to the human rights agency.

⁴⁸Mack, at 138.

⁴⁹This is a requirement under the current mediation policy in some jurisdictions. However in practice, parties sometimes settle privately and withdraw the complaint in order to avoid this step. As a result, mediators should report on all complaints.

In addition to a policy statement, implementing transformative mediation requires the development of guidelines, protocols and a training program for mediators. Guidelines and protocols would cover topics such as: steps to be taken in managing the process; dialogic and relational practices; the nature and forms of acceptable mediator influence; accountability measures; an ethical code; safeguards against mediator participating in litigation as a witness; and, the requirement of respectful conduct toward all participants.

Mediators require a substantive knowledge of human rights law, although they need not be lawyers. They need to acquire a in-depth understanding of the narrative approach and the relationship between individual and systemic manifestations of inequality. As noted in the earlier discussion, transformative mediation requires an orientation that is based on an "ethic of curiosity" and requires a rethinking of the approach that underlies current practices.⁵⁰

At the same time, there may be a requirement for other types of mediation practices at certain stages of the process. The transformative approach is most crucial in the early stages. Problem-solving mediation, or even evaluative mediation, may be useful at the latter ends of the process where the parties are eager for more directive assistance in formulating specific outcomes. Mediators need to be trained in a variety of approaches and techniques and to develop a reflective diagnostic ability to know when to apply these options.

f. Multi-Option System

Transformative mediation should be seen as one option within a multi-option human rights conflict resolution system. There is a continuing role for, by way of example, early informal settlements for

⁵⁰The ethic of curiosity is based on the idea that there is "no one single truth or uncomplicated reality" and that stories are not a lower form of organizing perceptions than 'fact' or 'reality'. Rather than confirmatory forms of question that can too easily turn into an interrogation or cross-examination, transformative questions are exploratory. Parties are seen as agents who make interpretations or meaning rather than just furnishing mediator with information out of which meanings of events will be made. The mediator needs to be genuinely interested in learning about what the client thinks rather than seeking to confirm hunches. The mediator's questions are more likely to be focused on eliciting stories rather than facts. (Winslade and Monk, at 126.)

relatively uncomplicated complaints and for adjudicative hearings of complex legal issues. However, transformative human rights practices require that the current focus should be shifted away from the adjudication process and toward mediation.

Human rights agencies treat mediation and other forms of settlement discussions as "a natural part of the litigation process."⁵¹ This is consistent with the general "ADR" approach adopted within the legal system. While some commissions have tried to move from a "managing to litigation" to a "managing to settlement" model, the focus is still very narrow. Adversarial processes continue to dominate leaving only a small role for institutionally-based informal processes.⁵² For example, mediation is seen to be a process that is not applicable to systemic cases, wherever a precedent is required, or there is high public interest.⁵³

This study has argued that a reconceptualization of the role of human rights commissions would lead to a greater role of transformative mediation. In effect, these practices are more likely to achieve social justice by addressing the individual and systemic consequences of inequality in an integral way and by promoting the application of equality norms by the parties themselves. This reconceptualization should be reflected in the structure of the complaints process which places mediation, rather than adjudication, at its center.

Mediation would no longer be seen as a step within adjudication or even as a parallel process. Rather, mediation becomes the primary process and adjudication becomes the alternative. Hearings come to be seen as an option only in certain, exceptional cases. These could include: only after mediation has failed; as an initial option for a limited number of cases; and/or utilized strategically within a mediation such as where an authoritative pronouncement on a legal issue is required.

⁵¹See for example, *CHRA Review*, at 67.

⁵²This priority on litigation is maintained despite the fact that the vast majority of legal disputes are never tried. Nonetheless, they continue to be shaped largely by the adversarial model.

⁵³*Id.*, at 81.

This multi-option system would be based on a presumption for mediation as the primary process in all cases, unless there are demonstrable reasons that it could be harmful to either party or to the public interest.⁵⁴ Research has demonstrated that mandatory participation does not harm the process, the perceptions of fairness, the volition of the parties or the settlement rate.⁵⁵ Mandatory participation should be contrasted with undue pressure to settle which can clearly affect the voluntary nature of resolution and has a negative impact on both procedural and substantive fairness.⁵⁶

The transformative mediation process is designed to overcome the parties reluctance to participate. The parties are co-participants with the mediator and the process works by encouraging their full participation in all aspects of the process and design of outcomes. In addition, specific aspects of the transformative mediation process, such as the mediator's role in enhancing fairness, promoting the public interest and advocating equality norms, address most of the concerns that usually lead to exemptions from mediation.

There may be some situations where the transformative mediation process cannot work. The central requirement of this model is that parties are open-minded and reasonable. This suggests that the mediator may need to divert the complaint to another process where either party is unwilling or unable to participate in this manner. However, this should not be taken as a given since the conditions for openness and reasonableness can be consciously created during the mediation process

⁵⁴Two situations where mediation is manifestly problematic are where there is (1) a history or imminent threat of violence; and (2) where one party is clearly disadvantaged or damaged by a mediation process. All necessary steps should be taken to identify the potential for harm as much as possible before entering the process. However, mediator's experience has shown that this is not easy. For example, mediators in family law disputes have found it difficult to identify violence in relationships between the parties, even when steps are taken to screen for this. In addition to the parties or the commission being able to request an exemption from mediation, the mediator must remain aware of these potential concerns throughout the process and be prepared to discontinue mediation where necessary.

⁵⁵See for example, Kressel, "Mediation", at 526.

⁵⁶This is one of the main criticisms of current human rights processes that create undue pressure to settle. This point was emphasized in *The Cornish Report*. For other views on the mandatory/voluntary debate see also Mack, at 135-7; J. Rosenberg, "In Defense of Mediation" (1991) 33 *Arizona Law Review* 469; Melinda Munro, "Musings on the Consequences of Mandatory Mediation" (1999) 57(2) *The Advocate* 193.

even when they are not obvious at the outset. The mediator should also be empowered to disengage from the process if one of the parties is not prepared to agree to basic procedural processes required for the mediation to take place with safety. This might occur, for example, where one party demonstrates that she is not seeking understanding or resolution but rather to use the process to discredit and consistently attack the other.

In a multi-option system, the conflict resolution policy should make it clear how the various options fit together. The human rights agency must develop the capacity to diagnose conflicts and make recommendations to the parties on the options or direct them to the appropriate one. There should always be some flexibility to move from one process to another where this becomes necessary. For example, the mediator could have the power to refer a specific legal issue to the hearing body for a quick determination.

B. Internal Responsibility Models

Over the last two decades greater emphasis has been placed on internal models for dealing with human rights complaints within an organization. These developments recognize the value of having a dispute resolution process in the workplace to create a healthier environment, fulfil the employer's responsibilities and contribute to a culture of tolerance and accommodation.⁵⁷

In many cases, these organizational developments have followed the legal model in developing internal mechanisms for the review of complaints that apply "due process requirements" in a more informal setting.⁵⁸ However, in some cases more proactive models have been implemented that set out the positive measures that the organization is committed to take in order to promote equality, in addition to providing a method to deal with discrimination claims.

⁵⁷Hughes, "Workplace Speech and Conduct Policies" at 107; *CHRA Review*, at 27.

⁵⁸Hughes, at 106.

The *Canadian Human Rights Act* Review Panel recommended that the *Act* require all employers with more than five employees establish an internal responsibility system to deal with human rights matters within their control.⁵⁹ The Panel set out a number of important elements for this internal responsibility model that reflect a mix of proactive measures as well as mechanisms for the resolution of complaints.⁶⁰ The recommendations deal with how this internal process will relate to the Tribunal's complaint process.⁶¹ However, the report does not discuss the nature of these processes in detail other than recommending that they could integrate many of the features of existing workplace health and safety committees. The Report suggests that the Commission should have a role in developing guidelines and providing training to assist in the establishment and functioning of these internal responsibility committees⁶²

Human rights commissions could play a role in fostering critical learning and review processes within other organizations. This role would complement reform of the commission's complaints process and provide another mechanism to implement transformative human rights practices.

The legal model may be inapt for internal responsibility processes where the purpose is to change

⁵⁹Recommendation 11, at 28-33.

⁶⁰Recommendation 12. These elements are:

- (a) labour-management cooperation;
- (b) policies and programs promoting equality development;
- (c) training provided to all managers and employees;
- (d) mechanisms for the internal resolution of complaints of discrimination, including effective remedies for discrimination and a right to refuse work in very serious cases;
- (e) senior level commitments;
- (f) monitoring and documenting equality issues in the workplace;
- (g) maintaining liaison with the Commissions and other sources of information about human rights in the workplace;
- (h) monitoring the effectiveness of equality programs and procedures; and
- (i) compensation and protection of employees engaged in the work of the system.

⁶¹Recommendation 13: Where an employer can show that an effective internal responsibility system is in place for the resolution of complaints, the Tribunal may dismiss a claim unless the claimant proves that this system has failed to deal fully with the human rights issues raised by the case or failed to provide an adequate remedy.

⁶²at 32.

the culture of the workplace.⁶³ A critical learning process is required because it recognizes that change is primarily an educational process. Whereas in the legal model, educational components are subsidiary to enforcement, here they are front and center.⁶⁴

One of the essential requirements of changing an organization's culture is to incorporate the views of those who have traditionally been excluded within the workplace. The result is that workplace patterns, norms and relations are renegotiated. They are no longer defined by what the dominant group believes is legitimate, but by what diverse women and men of minorities believe is legitimate.⁶⁵ This does not refer to personal standards but rather the development of an understanding based on systemic patterns.⁶⁶ Educational processes are much more open and inclusive by comparison with the focus on a specific dispute within an adversarial process.

The educational model of change recognizes that transformative process are more complex and more disruptive of established norms than those carried out through the legal model.⁶⁷ It requires measures that are external to an adversarial process:

For example, if the goal is to change the culture, strong statements of commitment from the people who count, on-going education, responding through the existing mechanisms to instances of harassment, taking disciplinary action and supporting complainants when appropriate, all actions which can be taken by the employer and are probably already required by human rights legislation, are what are needed. This approach requires ongoing evaluation and learning; it is dynamic in its own sphere with the "back-up" of the public legal system. It is time to reconsider whether detailed procedural codes, imitative of the legal model, best advance the spirit of change which a contemporary rule of law should support.⁶⁸

⁶³Hughes, "Workplace Speech and Conduct Policies", at 109.

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶*Id.*, at 120.

⁶⁷*Id.*, at 121.

⁶⁸*Id.*, at 125.

This insight can be taken a step further by incorporating models of critical reflective learning developed in social-psychological literature into this internal responsibility system. These models make the learning process more profound by encouraging participants to not just reflect on experience, but to reflect on assumptions, values, beliefs, or norms that influence action. Reflection opens up lines of thinking that would otherwise remain unexplored. This process involves mapping out responses to situations in a way that identifies deeper patterns that cause conflict. It intervenes in these patterns of behaviour and encourages participants to act in new ways. Linking this model up with equality norms fosters transformation leading to social justice.

As an example, the critical learning and review model can be applied to sexual harassment in the workplace.⁶⁹ When sexually harassing behaviour occurs, typical action strategies of the victim of these behaviours include making a joke out of it or pretending it did not happen and say nothing. At the systemic level, managers and others ask victims to "just handle it," to tease and make light of it, and to expect victims to confront it alone without upsetting the system. The consequences of both these individual and systemic strategies virtually guarantees that the behaviour will be perpetuated and likely escalate. None of the individuals affected by the behaviour (ie. perpetrators, managers and victims) learn how to define limits of acceptable behaviour in the workplace and a sexually harassing culture will be tolerated or encouraged.

The standard complaints process based on the legal model is remote and the costs of utilizing it are often very high for the victim. When this option is pursued, the conflict is taken out of the context of the workplace and dealt with in isolation. Rarely does this lead to education and change since the emphasis is on determining the facts and enforcing a remedy.

An alternative approach that changes the dynamic described above can be instigated through a critical learning process. Here, the individual response is to recognize that both she and others are affected and ask that all concerned become involved in remedying the situation. A facilitated

⁶⁹This example builds upon the examples used by Marsick and Sauquet, "Critical Learning Processes".

dialogue that encourages participation and reflection is instigated. The behaviour will be publicly discussed and consensus may emerge about what is and is not acceptable. The system or management response will be placed in a position where either it publicly admits that it tolerates this behaviour or begins to engage in explicit conversations to help both victims and perpetrators make meaning of "sexually harassing behaviour."⁷⁰

This approach is comparable to transformative mediation in the sense of aligning the various parties against the problem. It also builds in prevention of further conflicts by assisting in the transformation of patterns of behaviour.

Facilitators can help to build critical learning review processes within organizations. Reflective processes of this type can take place before or after a specific conflict becomes manifest. In particular, facilitators help create a respectful, safe environment for views to be expressed through the formation of dialogue groups.⁷¹ The learning process can assist in identifying and addressing the underlying values and beliefs that influence cultural norms. Once this is accomplished, deliberative practices can be employed to identify and consider preferred ways of acting.

Deliberation of this type can be fostered by the careful creation of conditions for the dialogue group. These conditions include that the group must be free from coercion and all participants must have an equal opportunity to assume the various roles within discourse (to advance beliefs, challenge, defend, explain, assess evidence, and judge arguments).⁷² Participants must also be open to other perspectives and willing to listen and to search for common ground or a synthesis of different points of view. Facilitators have a major role in initiating dialogue groups although they can become self-sustaining.

⁷⁰*Id.*, at 394.

⁷¹Mezirow, "Transformative Learning: Theory to Practice", at 10.

⁷²*Ibid.*

This approach is particularly helpful in balancing the individual and systemic manifestations of inequality within an internal responsibility system. It recognizes the organization-wide interest in resolution as well as the need for an individual remedy. In a sexual harassment case, there are usually more than two parties affected by the harassing and abusive behaviour. Those affected potentially include: the victim, the alleged harasser, the employer, in many cases a union, and other employees (especially those who may also have been victims of sexual harassment but never came forward and complained).⁷³ Critical learning processes facilitate taking these "non-party" interests into account.

Broader participation assists in dealing with the conflict in a fully contextualized manner and the development of systemic approaches to promoting equality and preventing future conflict. Research has demonstrated that companies whose policies and procedures inform and educate reduce the occurrence of harassment.⁷⁴ Remedies that involve the whole workplace rather than just the individuals immediately affected have the greatest potential for change.⁷⁵

Human rights commissions can facilitate the integration of these types of internal critical learning and review models. This can be done relatively passively by developing guidelines for these types of processes and protocols for the establishment of dialogue groups. In addition, commissions could act as facilitators within these processes and/or train facilitators within other organizations.

The integration of transformative mediation practices and the capacity to facilitate critical learning review processes requires human rights commissions to change at a number of levels. At the ideational level, these transformative human rights practices require the commissions to rethink their

⁷³A.P. Aggarwal, "Dispute Resolution Processes for Sexual Harassment Complaints" 3 *C.L.E.L.J.* 61 at 63.

⁷⁴J.E. Gruber, "The impact of male work environment and organizational policies on women's experiences of sexual harassment" (1998) 12 *Gender and Society* 301.

⁷⁵*Ibid.* See also: Sandy Welsh, Myrna Dawson and Elizabeth Griffiths, "Sexual Harassment Complaints to the CHRC" in *Women and the CHRA: A collection of policy research reports* (Ottawa: Status of Women Canada, 1999).

mandate and their approach to resolving complaints. A large variety of institutional changes flow from these fundamental shifts. Implementing these reforms necessitates changes in the attitudes, perceptions and behaviours of commission staff, parties within the complaint processes and their legal representatives.

5.3 Promoting Equality

Recent reports on reform of Canadian human rights commissions have emphasized the need to develop a greater capacity to deal with systemic equality issues. The inability of commissions to carry out these proactive functions effectively is underscored by the development of supplemental regimes such as employment equity and pay equity in many jurisdictions. It is also reflected in the small number of systemic discrimination cases that have been successful to date.⁷⁶

Unlike many other administrative and regulatory agencies, human rights commissions have restricted powers outside of the complaints process. This problem is highlighted in the following comment made with respect to the *Ontario Human Rights Code*:

In ordinary constitutional and administrative law practice, general initiatives are not accomplished by decisions in individual cases but by regulation. I do not know how the Commission was expected to carry out its broad mandate without wider power of regulation than what at present may be accomplished under s.48, which deal with relatively trivial matters. The Commission was given a sweeping mandate to eradicate discriminatory practices but no apparent power to carry it out.⁷⁷

⁷⁶For example, the CHRA Review Panel reported that there has been little experience with litigating systemic discrimination cases and that there have only been three "broad systemic cases" brought under federal human rights legislation (*Action Travail; Gauthier v. Canada (Canadian Armed Forces)* (1989), 10 CHRR D/1064 (Can. Trib.); and *National Capital Alliance on Race Relations v. Canada (Minister of Health)* (1997), 28 CHRR D/179 (Can. Trib.), at 16.

⁷⁷Research paper prepared for the Cornish Task Force by Hon. Robert F. Reid cited in *the Cornish Report*, at 68-9.

All of these reports have recommended that human rights commissions should have additional powers, tools and strategic approaches to fully carry out their mandates. These recommendations include:

- the power to make regulations in order to set standards regarding recurring matters;⁷⁸
- the power to develop and promulgate codes of practice and policy statements to clarify compliance with human rights legislation and to educate the general public about the issues and their solutions;⁷⁹
- the power to review and report on the consistency of provincial statutes, regulation or government policies with human rights law⁸⁰ and recommend law reform;⁸¹
- enhanced audit powers⁸² to be used, for example, to monitor compliance with human rights regulations;⁸³
- the power to hold public inquiries or an enhanced inquiry power where one already exists;⁸⁴
- greater reporting powers,⁸⁵ for example on any human rights issue not simply its own activities;⁸⁶

⁷⁸*Black Report*, Rec 3-D-26 discussed at 183-5; *CHRA Review* Rec. 16 and 17.

⁷⁹Codes of practice are a non-legally binding way of developing standards for achieving equality. They can deal with equality issues for large groups of employers and service providers by providing cooperation in their development and uniformity and certainty in the standards that they set. *CHRA Review* at 37, recommendation 19.

⁸⁰*SHRC Report*, recommendation 4-24, at 27.

⁸¹*Cornish Report*, recommendation 8.

⁸²*SHRC Report*, recommendation 4-8.

⁸³*CHRA Review*, recommendation 18.

⁸⁴*Cornish Report*, recommendation 8; *CHRA Review*, recommendation 21.

⁸⁵*CHRA Review*, recommendation 117.

⁸⁶*SHRC Report*, recommendation 4-23.

- enhanced human rights education activities;⁸⁷
- an ongoing program of consultation with other agencies and ministries of government to encourage them to enact standards within their mandate to carry out the purposes of human rights legislation;⁸⁸ and,
- an ongoing program of public consultation to build relationships with community groups and to proactively and constructively engage the "respondent community".⁸⁹

This summary illustrates the multifaceted approach that is required to promote equality. This approach is based on the recognition that a general broadening of responsibility for human rights is required.⁹⁰ It is entirely consistent with the requirement of human rights commissions to promote a broader dialogue on human rights developed in this study. The potential of these specific recommendations to promote equality can be assessed on the basis of their capacity to integrate transformative human rights practices and individual and systemic approaches. This assessment is carried out under two themes: facilitating public dialogue and facilitating governmental reflection.

(i) Facilitating Public Dialogue

Many of the new or enhanced powers, tools and strategic approaches set out above will only promote equality if they also enhance a broader human rights discourse within the public sphere. Commissions need to facilitate public deliberations on how to deal more effectively with larger patterns of inequality in society. Public dialogue will be enhanced by implementing these novel mechanisms in ways that are consistent with transformative human rights principles.

⁸⁷*SHRC Report*, recommendations 11-1 to 11-5; *Black Report*, recommendations 3-B-1 -4; *Cornish Report*, recommendations 75-81; *CHRA Review*, recommendations 23-25.

⁸⁸*Black Report*, recommendation 3-D-27.

⁸⁹*Cornish Report*, recommendation 8, discussion at 65-7.

⁹⁰*SHRC Report*, recommendation 3-3.

This potential is examined with respect to three processes: (1) multilateral mediations for the development of regulations and other forms of human rights policy; (2) public inquiries or hearings; and (3) an ongoing general dialogue on equality. In each of these processes, attention should be placed on the relationship between individual and systemic approaches. For example, an individual complaint can trigger a broader consultation or dialogue. Conversely, agreement on a regulation or policy statement is likely to give rise to more individual complaints because clearer and more highly publicized guidelines provide a standard against which actions and omissions can be measured.

Transformative human rights principles require that regulations and policy statements be developed by human rights commissions through a collaborative process. Structural inequalities create complex and overlapping systems, policies and behaviours. Collaborative models create greater opportunities to formulate, implement and enforce policy that accommodates diverse interests in a complex socio-economic environment.⁹¹ A transformative approach require going beyond traditional approaches to consultation with stakeholders. A more deliberative, inclusive and participatory model for a collaborative process is provided by a multi-party mediation model. It is proposed that human rights commissions would be responsible for convening this process and establishing conditions for reflective and equal participation of interested parties.

The commission's role in this regard could be shaped by the transformative mediation model developed earlier. However, the process would be different in some ways the one outlined above, given the number of parties involved. A multilateral mediation process provides ample opportunity for dialogue that engages the parties, encourages the sharing of perspectives, deconstructs the dominant discourse and fosters the development of alternative accounts that can reconstruct the regulatory relationship and lead to the development of specific regulations. This participatory process also has a greater potential to build in momentum for compliance by comparison with traditional consultative approaches.

⁹¹Allan Reid, "Seeing Regulation Differently: An ADR Model of Policy Formulation, Implementation and Enforcement" 9 *CJALP* 101.

A multi-party transformative mediation model engages human rights commissions in protecting the public interest in a different way.⁹² In this model, commissions are encouraged "to see themselves as impartial guardians of a collaborative decision-making process...This process allows for a more dynamic and participatory unfolding of the public interest."⁹³ The commission takes the same fairness-enhancing and norm-advocating functions in this broader third party role.

Transformative principles can also contribute to capacity of human rights commissions to effectively implement a power to hold inquiries or public hearings. This power has already been used effectively by several human rights commissions, notably the Australian Human Rights and Equal Opportunity Commission⁹⁴ and the Quebec Human Rights Commission.⁹⁵ A public inquiry is particularly useful when a broad problem of inequality has been identified but has not yet manifested itself as a conflict. This occurs where a pattern of systemic discrimination has been identified but there is no obvious way to address it because the solutions involve a spectrum of associations and

⁹²*Id.*, at 118.

⁹³*Ibid.*

⁹⁴The Australian Commission undertook an inquiry into Australia's stolen Aboriginal children at the request of the government. (Australia, Human rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (Sydney: HREOC, 1997). The Commission has also undertaken a number of inquiries on its own initiative including an 1987 inquiry into the homelessness of children and young people. (Australia, Human Rights and Equal Opportunity Commission, *Our Homeless Children* (Canberra: Australian Government Publishing Service, 1989).

⁹⁵See for example: 1982 public inquiry into allegations of racial discrimination in the taxi industry (*Investigation Into Allegations of Racial Discrimination in the Montreal Taxi Industry: Results and Recommendations; Investigation Into Allegations of Racial Discrimination in the Montreal Taxi Industry - Final Report* (Montreal: Quebec Human Rights Commission, 1984); 1987 inquiry into relations between the police and ethnic and visible minorities. (*For the Police of the Future: Tomorrow is Today! Final Report of the Follow-up Committee responsible for monitoring the recommendations of the Investigation Committee on relations between police forces, visible and other ethnic minorities* (Montreal: Quebec Human Rights Commission, 1992). 1990 inquiry into racist violence originating in a series of anti-Semitic incidents. (*Violence and Racism in Quebec* (Montreal: Quebec Human Rights Commission, 1992); 1993 inquiry into violence and discrimination against gays and lesbians (*From Illegality to Equality* (Montreal: Quebec Human Rights Commission, 1994).

In addition, during the Oka crisis the Commission was called on to determine whether basic human rights were being infringed. (Quebec Human Rights Commission, *A Collective Shock* (Montreal: Quebec Human Rights Commission, 1991).

institutions.⁹⁶ For example, many social and economic rights embrace "issues too wide to be addressed by an individual complaint."⁹⁷

A public inquiry promotes public dialogue through a variety of methods. These include: generating valuable research, information-gathering, ascertaining the views of the public, consensus-building and developing detailed solutions.⁹⁸ For this reason, it is seen as one the most significant commission powers despite the fact that the outcomes are not directly enforceable. It is a flexible device which provides "a sort of group or multiple complaints procedure for those who do not have the financial or social resources to lodge individual complaints."⁹⁹ However, existing models of public inquiries do not hold out much promise for transformative opportunities. For the most part, they encompass a passive and often adversarial model. Transformative practices can be integrated into the public hearing function of human rights commissions. This model would be more dialogical and relational than existing models.

Today, the emphasis is on "hearings" in which various parties present their defined views to the commission and then the commission submits these to reasoned discussion and presents recommendations for reform. Under this enlarged view, the role of the commission would be to engage in a broad, public conversation about a given human rights issue. Suggestions for reform would develop through a structured public, story-telling process, involving the deconstruction and the reconstruction of an alternative story to govern relations within the community. The reasoned assessment would not take place as a second stage behind closed doors, rather it would be integrated into the public dialogue.

⁹⁶*CHRA Review*, at 40.

⁹⁷Hunt, *Reclaiming Social Rights*, at 193.

⁹⁸Nicholas d'Ombrain, "Public Inquiries in Canada" (1997) 40 *Canadian Public Administration* 86, at 92.

⁹⁹Hunt, at 195.

Narrative models for public hearings have been utilized in a number of countries, notably the South African Truth and Reconciliation Commission which was established with the purpose of uncovering and confronting the truths about the gross human rights violations and racial oppression that had torn the country apart.¹⁰⁰ This Commission played an important role in signalling a commitment to break with the past and build a future based on respect for human rights. Similar work on a smaller scale has been undertaken with Holocaust victims and victims of sexual assault and domestic violence.¹⁰¹

The purpose of these narratives processes is not simply to find facts but also to send a message to the victim and to the country that the government and the public care about what happened, thereby facilitating the healing process.¹⁰² This enables the transformation of private injustices into publicly-recognized and acknowledged ones. This dynamic has been explained in these terms:

While a victim's act of telling her story is an extremely personal moment, the telling of this story in a public forum involves the community so that "the seemingly private experience" becomes a "public one."¹⁰³

This public acknowledgement is a first step that should be followed up by some form of "community action" or "restitution" that help to "rebuild the survivor's sense of order and justice."¹⁰⁴

One specific proposal along these lines is for community-based racial reconciliation process in the US based foremost on through the telling of personal stories.¹⁰⁵ This process would be managed by

¹⁰⁰Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998) at 60-61.

¹⁰¹Judith Herman, *Trauma and Recovery* (1997) discussed in Minow, *Between Vengeance and Forgiveness*, at 70-73.

¹⁰²*Ibid.*

¹⁰³Minow, at 67-8.

¹⁰⁴*Id.*, at 70.

¹⁰⁵Wacks, "A proposal for community-based racial reconciliation". He proposes that the US government should "create a distinct forum in which individuals can tell their own stories about race - about attitudes and perceptions

a national commission which would have a role in synthesizing the narratives with a view to recommending reform. The stories themselves would be broadcast through a number of media and venues. The basic premise of this proposal is that: "only after obtaining a deeper understanding about why attitudes about race exist and about how people and institutions form and daily perpetuate such attitudes can individuals and the US as a whole heal the wounds of race conflicts."¹⁰⁶ A broad narrative exercise of this type would have an important educational role by contributing to an understanding of racism and teaching members of society about the pervasiveness of racism and its damaging effects. It would equip the government with more detailed information about the needs of the American people so that it can tailor solutions to address those needs. This approach is also seen to facilitate the empowerment of those who have experienced racism.

This process would enrich public discourse by facilitating the presentation of multiple perspectives in a government-sponsored forum that would lend legitimacy to victims of racism in presenting their "competing versions" or "counterstories."¹⁰⁷ The focus of this process is on the "simple opportunity to convey directly the narrative of their experience" and to produce a coherent, if complex narrative about the entire nation's trauma and the multiple sources and expressions of discrimination.¹⁰⁸ While it would give rights more meaning and help to develop more informed theories and responses, it would not lead directly to remedies.¹⁰⁹

of race that they have experienced, encouraged or tolerated - to uncover ideas about racism in American and to acknowledge the pain that stems from racism." (at 197) He would call this the United States Commission on Knowledge and Acknowledgement (USCKA).

¹⁰⁶*Id.*, at 196.

¹⁰⁷Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 *Michigan Law Review* 2411, at 2415-6.

¹⁰⁸*Id.*, at 232.

¹⁰⁹This process would recognize all forms of racism not just legally actionable ones. It would supplementing the existing legal system. However, some of the stories made public through this process could give rise to legal actions.

These narrative models are presented as completely outside of the legal model. They do not fully conform to transformative principles because they do not incorporate processes for reasoned debate on the applicability of human rights norms. Narratives are an important part of the resolution process, but they are only the first step. These models promote a disjunctive approach, whereas the strength of the public hearing process is its comprehensiveness. Nevertheless it is important to build insights from this model into public inquiries.

One of the difficulties with many current inquiry models is that there is insufficient attention paid to developing an understanding of the issues in the public sphere. The "commissioners" or other members of the inquiry are involved in a critical learning process. They have the opportunity to hear the narratives first hand and to engage in a process of deconstruction and reconstruction. This learning process is summarized in their report. However, the power of the narrative process is lost in the translation. As a result, the recommendations are often perceived to be too "radical" by the government and members of civil society because they have not been engaged in the deliberative process.

The proposal for a national US racial reconciliation process through story-telling has the potential to address some of these deficiencies. For example, this model could have been integrated into the process undertaken by the Royal Commission on Aboriginal Peoples.¹¹⁰ This would have involved employing a number of strategies to share the stories of Aboriginal individuals and groups with Canadians through various media on an ongoing basis throughout the Commission process. This approach would have promoted discourse on these issues in the public sphere over an extended period of time and involved a greater number of people in the Commission's critical learning process. It would have assisted in the transformation of public opinion about these issues and potentially could have been translated into support for the Commission's recommendations.

¹¹⁰This Commission was not a human rights commission initiative, but it is a comparable approach to the types of public inquiries that a commission could undertake (although the latter would tend to be focused on more specific issues).

Human rights commissions can also consider integrating large group intervention methods such as open space technology discussed in Chapter 4 as one aspect of a public hearing process. These flexible methods are particularly effective in both the engagement-narrative building stage and the development of alternatives that assist in reconstruction. They foster innovative approaches to understanding a complex web of inequalities because they do not structure participation within previously conceived definitions of the problem or potential solutions. The openness of the process enhances the transformative possibilities within a public dialogue.

A third process that is undertaken by human rights commission is fostering an ongoing public dialogue on equality. The importance of this type of initiative has been noted in these terms:

The general public needs to know about the changing meaning of equality so that they can understand the stories they read in the newspapers. We all need to learn more about each other's needs and aspirations in order to act in a more inclusive way. The government needs to learn about the equality issues developing in society.¹¹¹

The need for a broad dialogue in order to achieve social justice has also been recognized in many human rights reports. For example, the Quebec Human Rights Commission's 1990 inquiry into racist violence recommended a diversified approach to addressing racist violence including "a public debate on the phenomenon of racist violence, with a focus on working out a shared vision of the integration of cultural communities in Quebec society."¹¹²

Human rights commissions facilitate this broad dialogue through their educational and consultative processes. However, members of society should not be seen as passive recipients of educational initiatives on human rights. Rather, they should be provided with the tools to participate effectively

¹¹¹*CHRA Review*, at 43.

¹¹²Quebec Human Rights Commission, *Violence and Racism in Quebec* (Montreal: Quebec Human Rights Commission, 1992).

in this dialogue. This is the approach fostered by transformative public legal education.¹¹³ Within transformation educational initiatives, learning is not a one way street. This approach blurs the line between consultation and education. For example, the commission could facilitate a process on equality norms with a group of women who had recently immigrated to Canada. During the session, the participants would learn more about human rights norms but also teach commission staff about their experiences and their perspectives on the best mechanisms for promoting equality within their relational context.

These goals are more easily and effectively achieved through focused dialogue rather than open-ended discussions on equality norms. The Commissions' tasks in this respect should be seen as: "defining, monitoring, critiquing, and adjudicating and dialoguing on" questions of human rights.¹¹⁴

Efforts in this regard would give greater meaning to the concept of the commissions acting in "the public interest" since they place the commissions in a better position to ascertain and assist in the transformation of these interests. Increasing public deliberation on equality norms could also assist in building support for commission initiatives.

(ii) Facilitating Governmental Reflection

Human rights commissions also have an important role in facilitating governmental reflection about human rights norms. While the focus tends to be on the role of the courts and more particularly Charter litigation in shaping governmental action, human rights commissions have an underdeveloped function in this regard. This emerging role is evident in recent recommendations

¹¹³For an excellent example of a transformative public legal education initiative see Andree Cote, "Pour les damnees de la terre: l'education juridique populaire sur les droits des femmes" (1997) 10 *Canadian Journal of Women and the Law* 108. See also Karey Brooks, "Towards a Transformative Public Legal Education Program for West Coast LEAF: A Background Paper" (Vancouver: West Coast LEAF, August 1999) and Melina Buckley, "Towards Transformative Public Legal Education" (paper presented at national forum on *Transforming Women's Future*, 1999).

¹¹⁴Hunt, *Reclaiming Social Rights*, at 163. He links this function more specifically to economic, social and cultural rights.

for audit functions, promoting law reform and ongoing consultations between the commissions and government departments and other governmental agencies. A specific example of this role is the recommendation that governments incorporate human right standards into relevant statutes, such as building codes.¹¹⁵

In general terms, the commissions' mandate could be seen as reviewing the effectiveness of various public authorities in promoting equality norms as well as advising these authorities about their duties in this regard. For example, a commission's annual report could describe steps taken by it and other public authorities to promote equality (as well as recommended actions that had yet to be implemented). Other related strategic approaches include requiring public authorities to submit equality schemes that show how they intend to fulfil their equality duty, impact assessments of laws on the right to equality and other types of compliance mechanisms.

Other regulatory agencies have much greater capacities vis-a-vis government by comparison with human rights commissions. For example, the Commissioner of Official Languages carries out audits of federal agencies to measure the degree of application of the *Official Languages Act* and undertakes general surveys in order to analyze and propose solutions for problem areas. Over the last decade, this role has been furthered strengthened as the Languages Commissioner has been granted powers to enforce Charter language rights through review by the Federal Court. Although the Canadian Human Rights Commission has audit powers under employment equity provisions, it does not have comparable general powers.

The proposal is not that human rights commissions enter into an adversarial relationship with the government. Rather, the commissions should engage other governmental authorities in deliberative and reflective practices. They can engage governments by providing alternative accounts that are clearly derived from human rights legislation. For example, commissions can participate in legislative hearings to inform legislators about human rights norms and responsibilities. Similarly,

¹¹⁵See for example, *SHRC Report*, recommendation 10-1.

human rights commissions can educate members of other tribunals and regulatory bodies about the requirements of equality norms tailored to the context of their sphere of activity.

CHAPTER 6

THE TRANSFORMATIVE IDEAL: THE COURTS

6.1 The Courts and Transformation

The application of the transformative ideal in the courts is more complex than in human rights commissions. This complexity arises because the courts serve a number of functions beyond vindicating rights. The entire structure of the courts can not be geared toward transformative human rights practices unless a radical departure from existing practice is envisioned. This would entail, for example, the creation of a specialized court for this purpose, say along the lines of a constitutional court.¹ Although the idea of a "Charter" court or courts has some appeal, from the perspective of this study it is more interesting to consider how transformative human rights practices could be integrated into the existing litigation process. Focusing on the transformative possibilities within current judicial approaches and litigation practices enriches our understanding of the normative framework developed to this point.

At one level, it is possible to imagine transformative mediation practices being integrated into the litigation system as part of the current move toward informal dispute resolution options. This scenario would raise many of the same issues discussed in the previous chapter with respect to reform of the human rights complaints process. However, at another level, it is possible to imagine these ideals transforming the courts with respect to their rights vindication role. As noted in earlier chapters, litigation can play an important role in calling attention to a social justice issue in a public forum and is a mechanism for the assertion of agency by a subordinated individual or group.

¹This is the approach taken in Germany, France, India and South Africa. See discussion in Beatty, ed., *Human Rights and Judicial Review*.

It is this second set of transformative possibilities that is examined in this chapter. This discussion outlines measures to actualize the transformative conception of the judicial function as promoting a broad human rights discourse. It explores what this approach means for our understanding of court functions and the process of judging. In addition, transformative principles are applied to litigation processes under two themes. The first is the requirement for a public model for Charter litigation and the second is the desirability of fostering a multiplicity of litigation discourses on equality.

6.2 Transformative Conceptions of the Courts and Judging

A. A Public Theory of the Judicial Function

The theory of the judicial function as the ultimate dispute resolver in private legal matters is well-developed and accepted within Canadian society. There is no comparable theory for the public judicial rights vindication function and this hinders the transformative potential of the courts. A public theory would assist in movement toward the transformative ideal by clarifying the courts role within human rights discourse thereby providing a framework for more specific reforms along these lines. This section draws together the elements of a public theory of the judicial function developed in earlier parts of the thesis and discusses additional steps that could be taken in this analytical enterprise.

There are problems with the use of the terms "private" and "public" here as there are in any use of this dichotomy.² It is inevitably inaccurate since all legal disputes have a public function as well as a private function.³ Nevertheless, the distinction remains a useful one and is used here for several reasons. In particular, it highlights the idea that rights adjudication has a greater component of public

²For discussions of problems with the public/private dichotomy see:

³"Nobody, however, is entitled to preserve as a matter of purely private interest the legal rules and principles by which we are governed." Philip Bryden, "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* 490, at 492.

interest in the public-private mix than do most other disputes. It also brings attention to the fact that the resolution of private disputes is not the only role of the courts despite the tendency to describe the main judicial functions almost exclusively in these terms.

In addition, throughout this study the adjective "public" has been used in a valued, normative sense. The idea of a public theory is used in several senses here. First, public is used to underscore the importance of the need for broad engaged reasoned discussion and agreement about the courts' rights vindication function. Secondly, the term is used to highlight the fact that what is needed is a theory that encompasses all of the judicial functions vis-a-vis human rights adjudication, not one that isolates constitutional review of legislative action as if it were a totally separate role.

A framework for developing a public theory of the judicial function has been established in this study. It stipulates a model of the rights vindication function comprising four facets. These are:

- (a) the courts have a primary role in maintaining the normative conditions of public discourse⁴ by protecting and promoting basic human rights;
- (b) the courts take in ideas developed in the public sphere and make authoritative statements about rights norms;
- (c) authoritative statements about rights norms are then directly applied by elements of society (state, economy, civil society) and accepted, discussed, legitimated and indirectly applied through public sphere; and
- (d) the courts do not monopolize the interpretation of human rights, other legal and political institutions do so as well and members of society maintain an independent role in this process, played out within the public sphere.

⁴This could also be termed "democracy" in the enlarged, communicative sense promoted in this study. I do not use the term democracy here because it tends to be understood in a much more limited way. See discussion in Chapter 3.

This framework builds on the metaphor of the dialogue on constitutional rights between the courts and the legislatures that is emerging within Canadian jurisprudence. It broadens this nascent public theory of the judicial function by: widening the ambit of rights discourse beyond constitutional human rights that are traditionally the subject of theories of judicial review; promoting the image of ongoing discourse rather than one-off conversations; and envisioning this inter-institutional dialogue as mediated by the public sphere. This framework can thus be seen as contributing another step in theory-building. However, it does not amount to a comprehensive, definitive theory of the court's public functions.

This exercise in theory-development should be linked to enlarged conceptions of democracy. The communicative democracy model discussed in Chapter 3 provides an important contribution to this endeavour. The communicative model of democracy invites us to consider the roles of courts, legislatures, and other institutions in overlapping dialogic terms, rather than in dichotomous competitive ones. It stresses the importance of the public sphere in a viable democratic society.

Each of these societal segments has an important role to play in fostering a workable account of the judicial rights vindication function. Judges make important statements in each of their cases, consciously constructing their role. This has occurred for the most part in the context of Charter litigation but also in the judicial review of decisions made under human rights legislation. Governments also have a responsibility for assisting in the construction of this role in the arguments that they put forward in Charter cases. Similarly, political leaders contribute to this discourse in their public statements in reaction to judicial decisions and their general comments on the role of the courts. The media, advocates and academics all make a contribution. All of these elements have a role in shaping public opinion. The public is not a passive participant in this dialogue since public views are actively expressed to formal state actors both in litigation and other sites of discourse.

At present, not all of these contributions are truly reflective, many are more aptly characterized by their instrumental or strategic nature. In particular, steps toward developing a public theory of the judicial function have been constrained by a need to react to the extreme criticisms of "judicial

activism". The building of a public theory is itself a dialogic process and there is the need to shift the terrain of the debate to a more reasoned one. Reflective and reasoned deliberations about the rights vindication role need to be fostered and abetted within the public sphere.

Deliberations on the court's rights vindication role can be assisted through proactive steps. Some of these can be taken by judges and courts. These include use of accessible language and opening up new channels of communication with the public. Concerns about judicial independence are raised by judges directly engaging in public debate. In order to address these concerns, courts are in the process of developing mechanisms for communication, for example through liaison officers and so on. Other institutions, and particularly Ministers of Justice, professional legal associations and other justice-related justice associations, also have an important role to play in this regard.

Clearly, there is an important role for primary education about human rights and the judicial system and continuing public legal education in order to further develop capacity within the public sphere to play its mediating function. Human rights commissions and public legal education associations have taken the lead here.

Theory development is not an end in itself. Reconceptions of the courts' rights vindication role has important implications for the ways that judges carry out their duties and the ways courts operate on an institutional and procedural level. These interacting elements create the potential space in which transformative human rights practices can develop. Transformative possibilities exist at each level of change. A few examples are set out here in order to illustrate the dynamics of social transformation in the reform process.

The primary focus in developing a public theory of the judicial function is at the ideational level of change. This involves ways that we think about what the courts should be doing and the analytical approaches developed by judges to carry out this work. Changes at the ideological and analytical level are intimately tied to altering attitudes, perceptions and behaviours. These include changes to: individual and societal perceptions about the appropriate role of the courts; expectations about

litigation on the part of participants in this process; and the development of relevant behaviours in the form of practices by judges, lawyers, court administrators, and so on.

The relationship between analytic and attitudinal change is a dialectic one. As the courts define and redefine their view of their functions through their decisions, members of society define and redefine their opinions through discussion, deliberation and in some cases direct participation. These two processes lead to a new consensus. This level of change is looked at more closely in the next section on conceptions of judging.

Working toward a more refined public theory of the judicial function also has implications at other levels of change, particularly in terms of institutional procedures and practices. A number of these issues are reviewed in the following sections on the need to foster multiple litigation discourses on equality and implement a public model of Charter litigation.

The implications of this theory development at the structural level affect the relationship between legal institutions, political institutions and civil society within the public sphere. One example of change at this level is the possibility of seeing the responsibility for the formulation, implementation and monitoring of remedies as one that is broadly shared responsibility within the public sphere rather than solely the responsibility of either the courts or the legislatures. The transformative potential of this type of remedial discourse is examined in the next chapter.

B. The Transformative Potential of Judging

One aspect a comprehensive public theory of the judicial rights vindication function is an understanding of the act of judging. The traditional grounds of this debate are delimited by the interpretivist/non-interpretivist dichotomy that shapes much of the debate on the legitimacy of judicial review.⁵ From a transformative perspective, judging is a fundamentally an interpretive act. It

⁵This dichotomy was discussed briefly in the discussion on judicial activism in Chapter 2. The non-interpretivist position conceives of judging as the act of construing the 'plain meaning' of the legal rules and principles and applying

involves the selective use of extralegal backgrounds and external factors which explain "how judges fill out the discretionary leeway they enjoy in their decisions on historical, psychological or sociological grounds."⁶

All interpretation has a creative character and therefore it is important to acknowledge that judging also encompasses "creative moments" and "creative legal findings."⁷ It is this creative character that contributes to law as a social learning process.

Although constitutional law and the adjudication of human rights norms have a breadth and openness that provide a relatively larger space for this creativity, all types of judging can be characterized as interpretive processes. The recognition of these interpretive and creative qualities is crucial because it provides a space within the act of judging for the consideration of diverse perspectives.

Currently, the transformative potential of judging is constrained by the continuing hold of an image of judging as a neutral act reinforced by the judicial activism debate. However, this hold is tenuous as illustrated in the Supreme Court of Canada's decision in *R.D.S. v. The Queen*⁸ in which members of the Court engaged in a highly reflective and conscious deliberation on the nature of judging.

R.D.S. involved the issue of reasonable apprehension of bias in a criminal law case involving a young Black man. The charge of bias was made in respect of comments made by the trial judge in delivering her oral reasons, in which she remarks on racial dynamics in the community. The Court was split both on the issue of whether or not there was a reasonable apprehension of bias in this case and on the principles and approach to be taken in making a determination of whether or not bias exists in a

them to specific fact situations. The interpretivist position conceives judging as fundamentally an exercise in interpretation, one in which 'plain meanings' depend on the social context.

⁶Habermas, *Between Facts and Norms*, at 200.

⁷*Id.*, at 244.

⁸[1997] 151 D.L.R. (4th) 193 (SCC).

given case.⁹ What is of particular interest here is the differing conceptions of judging that underlie the positions taken by various members of the Court.

In setting out the test for reasonable apprehension of bias, Justices L'Heureux-Dubé and McLachlin make an important distinction between the impossibility of judicial neutrality (in the sense of pure objectivity) and the necessity of judicial impartiality. This approach creates considerable room for recognizing social context within the process of judging. They conclude that the relevant jurisprudence recognizes that it is:

inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.¹⁰

These reasons place a heavy emphasis on the role of contextualization in their conception of the nature of judging. Questions of fact or law are not decided in a vacuum, rather they are "the consequence of numerous actors, influenced by the innumerable forces which impact on them in a particular context."¹¹ The judicial inquiry must perforce extend into the factual, social and psychological context within which litigation arises. Thus "a conscious contextual inquiry" is an important and widely accepted step towards judicial impartiality.¹²

In support of this approach, Justices L'Heureux-Dubé and McLachlin cite the following scholarly work:

⁹The plurality reasons jointly given by L'Heureux-Dubé and McLachlin JJ (concurring in by Gonthier and LaForest JJ) found that there was no bias. In separate reasons, Cory J (concurring in by Iacobucci J.) found that while there was no bias Judge Sparks remarks were "close to the line" of giving rise to a reasonable apprehension of bias. He specifically disagrees with the plurality reasoning on the test for bias while concurring in the result. Major J (Lamer and Sopinka, JJ) dissented in the result in finding that there was a reasonable apprehension of bias. However, the latter agreed with Justice Cory's delineation of the principles and approach to be applied in determining whether there was bias.

¹⁰at para 29.

¹¹at para. 41.

¹²at para 42.

What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind." We do this by taking different perspectives into account, This is the path out of the blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective...It is this capacity for "enlargement of mind" that make autonomous, impartial judgment possible.¹³

A number of sources can contribute to an understanding of the context or background which is essential to judging.¹⁴

From a transformative perspective, one of the most important aspects of these reasons is the integral role of human rights norms, and particularly the right to equality, in contributing to the context that shapes both the act of judging and the "reasonable person." It is the "reasonable person" that is the standard by which a judge's decision is measured to determine if it is free of bias. The reasonable person is characterized as:

an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s.15 of the Charter and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. These are matters of which judicial notice may be taken.¹⁵

This judgment thus builds the principle of equality into definition of reasonableness.¹⁶

Justice Cory's reasons are based on a different approach to the process of contextualized judging. He states that judges must and do make very effort to achieve neutrality and fairness in carrying out their

¹³Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997), 42 *McGill Law Journal* 91 at 107. Quoted at para.42.

¹⁴at para. 44. These include: testimony from expert witnesses, academic studies properly placed before the court, as well as the judge's personal understanding and experience of the society in which she or he lives and works.

¹⁵at para. 46.

¹⁶at para. 48.

duties.¹⁷ Despite endorsing the possibility of achieving neutrality, he also focuses on impartiality as the central concept.¹⁸ However, Cory J. does not suggest that neutrality requires judges to discount the very life experiences that "may so well qualify them to preside over disputes".¹⁹ He also agrees that the reasonable person should be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.²⁰

Despite the similarities in approach, Justice Cory envisions a narrower role for social context in the process of judging, one that can only be assessed on a case by case basis.²¹ Social context has an important role to play in developing legal principles, where it "is used to ensure that the law evolves in keeping with changes in social reality."²² However, there still must be proof that the general dynamics of social context actually applies on the specific facts of the case. In other words, there is a difference between acknowledging racism and finding that it is at work in a specific case.

The dissenting opinion written by Justice Major conveys a passive conception of judging, limited to the information provided by the parties.²³ However, the two concurring opinions assert a conception

¹⁷at para 118.

¹⁸Impartiality is described as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and the submissions. He notes that beliefs, opinions or biases can prevent a judge from putting aside any preconceptions and coming to a decision on the basis of the evidence. As a result these opinions, beliefs and biases must be overcome: "Throughout their careers, Canadian judges strive to overcome their personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them." at para. 116.

¹⁹*Ibid.*

²⁰at para 111.

²¹at para 121. Cory J. is particularly considered such as this one, where social context is apparently being used to assist in determining an issue of credibility (at para. 127).

²²at para. 122.

²³Judging is portrayed in these terms by Justice Major: "The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the courts decides the issues. Our

of judging as an act of interpretation. They both affirm the important role of social context in judging, although the reasons written by Justices L'Heureux-Dubé and McLachlin portray this role in larger terms.

A number of other issues are raised in this judicial deliberation that are important for the development of a public theory of the judicial function that is consistent with transformative human rights practices. First, the idea of equality as a principle which underlies the process of judging and definitions of reasonableness should be highlighted. While this approach is put in the strongest terms by the female justices, it is also alluded to in the concurring reasons. A related point is the requirement to "take different perspectives into account" in the reasoning process. These are examples of the ways that human rights norms help to shape the process as well as the substance of cases.

A second transformative aspect in this decision is the description of judging as "a conscious contextual inquiry." The description highlights the reflective nature of judging, one in which judges must critically reflect upon their own experience and the contextualized evidence in order to achieve the requirement of impartiality. Judges can be seen as mediators between "the ideal and the real" and it is this mediation function that provides human rights jurisprudence with much of its transformative potential²⁴ This is a subtext of the concurring sets of reasons in *R.D.S.* seen in terms of the requirements of the ideal equality norms and the recognition of the reality of discrimination and inequality within Canadian society. This mediating function is revealed even more starkly in the Court's view of its functions in adjudicating equality claims under section 15(1) of the Charter discussed in the next section.

system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts." at para. 15.

²⁴Habermas, *Between Facts and Norms*, at 277. He refers to Ackerman, "The Storrs Lectures: Discovering the Constitution" (1984) 93 *Yale Law Journal* 1083.

C. Transforming the Contextual Inquiry in Equality Claims

The Supreme Court of Canada has recognized that the Charter right to equality in s.15 is an inherently transformative provision. In its words, the challenge for the judiciary in interpreting and applying this Charter provision "is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision."²⁵

The central mediating factor between the abstract ideal of equality and the situation and experience of inequality is the context of the rights claimant and his or her claim. It is the context of a specific claim and its relationship with larger patterns of disadvantage within society which provide the connection and frame of reference for an interpretation of s.15. In this sense, context determines meaning. This is particularly true because the concept of equality is capable of multiple, and potentially conflicting interpretations.

The importance of contextualizing these claims was recognized in the first Supreme Court of Canada decision involving s.15(1), the *Andrews* case and refined shortly thereafter in the *Turpin* case.²⁶ In these and other decisions, the Court has advocated a "contextual approach" to equality rights that examines the larger social, political and legal context. This contextual approach is connected in an essential way to the substantive equality rights theory adopted by this Court. However, there has been uneven and inconsistent application of the contextual approach to equality rights by the various members of that Bench, and courts across Canada.

This section reviews the Supreme Court of Canada practice of contextualizing equality claims in sex discrimination cases with a view to uncovering transformative possibilities in this jurisprudence. This discussion builds on the idea of s.15 jurisprudence as encompassing both a doctrine and a social practice. It connects the reconception of equality rights set out in the first chapter with the

²⁵*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para.2.

²⁶*R. v. Turpin*, [1989] 2 S.C.R. 1296.

transformative ideal. In particular, it shows how the stages of the transformative mediation process can be integrated into the practice of contextualizing s.15 claims.

(i) Contextual inquiry and women's equality rights

Contemporaneously with the *Andrews* decision, the Supreme Court of Canada decided two cases on the nature of sex discrimination which serve as excellent examples of a conscious contextual inquiry. Despite the fact that these issues were determined in the context of human rights legislation rather than Charter jurisprudence, they illustrate how the contextual approach is essential to informing a finding of discrimination.

In *Brooks v. Canada Safeway*²⁷, the Supreme Court held that discrimination on the basis of pregnancy is a form of discrimination on the basis of sex. In doing so, the Court reversed its earlier finding in *Bliss v. Canada (A.G.)*²⁸ that discrimination on the basis of pregnancy is not discrimination on the basis of sex because "the distinction being made is between pregnant and non-pregnant persons".²⁹ In the earlier case, the Court had adopted the view that because not all women become pregnant, the distinction is not one based on sex. It overlooked the fact that only women become pregnant and laws that discriminate against women who are pregnant discriminate against women exclusively.

By contrast with the decontextualized definition of sex discrimination in *Bliss* which is abstraction to the point of absurdity, the *Brooks* decision "makes disadvantage visible" by paying attention to a larger social context of childbearing and the inequality of women.³⁰ The Court looked not only at the narrow question of the company disability policy and its impact on pregnant women, but also the broader question of what will enable women to function equally in society.

²⁷[1989] 1 S.C.R. 1219.

²⁸[1979] 1 S.C.R. 183.

²⁹at 190-91.

³⁰Day and Brodsky, *Women and the Equality Deficit*, at 59.

A similar, broad contextualized approach was employed in deciding *Jantzen v. Platy Enterprises*.³¹ Here, the Court had to consider whether sexual harassment was a form of sex discrimination under the *Manitoba Human Rights Code*. The Court's reasons highlight the context of the actual situation of women in the workforce marked by a sex stratified labour market and unequal power relations between men and women. The Court concluded that "sexual harassment is discrimination on the basis of sex because it denies women equality of opportunity in employment because of their sex."³²

The reasons in *Brooks* and *Jantzen* can be considered the high water mark of the contextualized approach to equality in the Supreme Court of Canada jurisprudence.³³ It is not clear that the lesson of contextualizing equality claims has been fully learned and the experience with section 15 claims has been uneven at best. In particular, the problematic nature of this inquiry is illustrated in the two cases dealing with the adverse impact of the *Income Tax Act* on women.

In the *Symes* case the issue was whether or not the interpretation of "business expenses" under the *Income Tax Act* in a manner that excluded childcare expenses infringed women's Charter right to equality.³⁴ In the *Thibaudeau* case, the issue was whether or not the tax treatment accorded to child support payments discriminated against women.³⁵ In both cases, the all-male majorities found that there was no discrimination against women while the two women judges dissented in finding that discrimination had in fact been proved and that the infringement was not saved by s.1 of the Charter.

³¹[1989] 1 S.C.R. 1252.

³²at 380.

³³*Action Travail* is a third case that could be assessed in a similar way to *Brooks* and *Jantzen*.

³⁴[1993] 4 S.C.R. 695.

³⁵The impugned provision treats child support payments received by custodial parents as the income of the parent who receives support payments. The claimant argued that it was discriminatory to take the amount paid as support out of the husband's taxable income and shifts his tax liability to her. She further argued her ability to support her children. Lahey argues that the Court "treated Suzanne Thibaudeau as a non-person, as a mere economic appendage of her husband - even after divorce" ("Legal Personhood", at 414).

The discrepancies in the findings in the majority and dissenting reasons in these two cases can largely be attributed to the different approaches to the contextual analysis undertaken by the justices. The contextual inquiry carried out by the dissenting judges made a clear connection between the structural inequalities within Canadian society, and more particularly, the gendered division of labour as it relates to childcare and the adverse impact of the tax provisions. On the other hand, the majority decisions did not accept the evidence of the connection between these societal patterns and practices and the legislative provisions. The latter's frame of reference was shaped by the context of the legislative provision rather than the context of the claimants and women as a group.

Insufficient attention to social context renders sex discrimination invisible. Nowhere was this more evident than in *Thibaudeau* where, despite the fact that the Court had evidence that 98% of recipients of child support payments are women, the majority treated the issue completely on gender neutral terms. This underscores the importance of the contextual approach to assist in giving meaning to facts such as the "98%".³⁶ Despite the fact that the principle that adverse effects can constitute discrimination is well established in the case law, adverse effects can be "discounted" where the court can be persuaded to focus on legislative purpose or treatment rather than the impact on the claimant.³⁷

There are ongoing debates about whether or not the equality claim made by Beth Symes that childcare expenses should be treated as business expenses is a valid one.³⁸ Regardless of the position that one takes within this debate, there are two aspects of the reasoning in the majority decision in *Symes* which can only be viewed as problematic given the requirement for a coherent contextual analysis of s.15 claims.

³⁶Pothier, "M'Aider, Mayday" at 324.

³⁷Day and Brodsky, *Women and the Equality Deficit*, at 90-1.

³⁸The concerns raised were that this claim dealt with the issue of the deduction of childcare in isolation of other related tax provisions and the potential negative consequences for other groups of women. For various perspectives on this case see: Day and Brodsky, at 82-91; Rebecca Johnson, "If Choice is the Answer: What is the Question? Spelunking in *Symes v. Canada*" in *Law as a Gendering Practice* ed. Dorothy Chunn and Dany Lacombe (Oxford: Oxford University Press, 2000) 199-222; Pothier, "M'Aider, Mayday".

First, to the extent that it acknowledged the ramifications of the primary responsibility for child care on women, the majority held that these costs originate in society not in law. The Court can exercise its power only in the realm of the legal: inequities in the social realm, however abhorrent, cannot be resolved by the courts.³⁹ Secondly, the reasoning in this case amounts to requiring a claimant to establish a causal link between a specific legislative provision and a disproportionate impact. Justice Iacobucci held that:

If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.⁴⁰

Before this decision, it was understood that a contextual analysis should be utilized to determine whether the legislative provision perpetuates discrimination through its adverse or disproportionate effect on a disadvantaged group. This higher threshold is extremely problematic.⁴¹ Discrimination is often a matter of a dynamic between a given practice and a wider context of inequality experienced by the group. The more disadvantaged the group, the easier it becomes to attribute a given instance of discrimination to pre-existing disadvantage.⁴² The very nature of discrimination often precludes rights claimants from being able to prove that a given law is the sole cause of the inequality complained of. It will almost always be possible to point to the claimant's group membership as a factor in a claim of discrimination.

³⁹Rebecca Johnson, "If Choice Is the Answer, What Is the Question?", at 216.

⁴⁰at 558.

⁴¹In *Eldridge v. British Columbia (A-G)*, [1997] 3 S.C.R. 264, La Forest J. distinguished the problematic holding in *Symes* on the grounds that there was a direct relationship between the social disadvantage borne by the deaf and their inability to benefit equally from the service provided by the government. (at 622)

⁴² Day and Brodsky at 90-1.

In contrast, the importance of a contextualized approach was underscored in Justice L'Heureux-Dubé's dissent in the *Symes* case:

though ostensibly about the interpretation of the Act, this case reflects a far more complex struggle over fundamental issues, the meaning of equality and the extent to which these values require that women's experience be considered when the interpretation of legal concepts is at issue.⁴³

The Supreme Court's record on appreciating the context of the claimant in sex discrimination claims has been uneven. It works when the issues raised can be easily identified as sex equality issues, for example when it relates to an obvious aspect of gender difference such as pregnancy. However, the structure of women's inequality involves a complex mix of biological, social and economic components.⁴⁴ In these complex equality claims, the context becomes even more important but also more difficult for the Court to understand.

Part of the problem is that contextual analysis is not carried out throughout the stages of inquiry. Often contextual analysis from the perspective of the claimant is only applied to the first stage questions relating the claimant to an enumerated or analogous ground upon which discrimination is prohibited by s.15.⁴⁵ The tendency is to then shift to the safe ground of focusing on the legislative context when actually assessing the existence of a discriminatory effect.

The Court's approach to interpreting section 15 has evolved in the past decade but has not changed in any dramatic way since the initial decisions in *Andrews* and *Turpin*. However, the Court has recently restated this law and augmented discussion on the contextual inquiry in the *Law* decision.⁴⁶

⁴³ at 482.

⁴⁴ See discussion in Chapter 1.

⁴⁵ This is true generally in s.15 cases, not only those dealing with sex equality claims. Cite other examples.

⁴⁶*Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497. Iacobucci J writing for the Court.

It is set out here in some detail as a basis for further discussion concerning the potential for developing a transformative contextualized inquiry.

Law holds the analysis of s.15(1) involves a purposive and contextual approach which permits the realization of the intended strong remedial approach contained in this Charter provision. It is not a fixed and limited formula. In general terms, the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally deserving of concern, respect and consideration. This definition incorporates both an anti-discrimination and a pro-equality understanding of equality rights norms.⁴⁷

There are three issues which together help the court to determine whether differential treatment constitutes discrimination in the substantive sense intended by s.15(1). These can be framed in three broad inquiries which a court should make:

- A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- B. Is the claimant subject to differential treatment based on one or more of the enumerated and analogous grounds?
- C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

⁴⁷However, the equality guarantee is still seen as a comparative concept, which ultimately requires a court to establish one or more relevant comparators.

The existence of a conflict between the purpose or effect of an impugned law and the purpose or effect of s.15(1) is essential to founding a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

The Court recognizes that there is a variety of factors which may be referred to by a s.15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the Supreme Court's jurisprudence and by analogy to recognized factors. Four important factors are identified by the Court. These are: pre-existing disadvantage; correspondence or lack thereof between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant and others; the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and the nature and scope of interests affected by the alleged infringement.⁴⁸

Analysis of each of the three elements is to be undertaken in a purposive and contextualized manner, taking into account the "large remedial component" of s.15(1) and the purpose of the provision in

⁴⁸The guidelines are "points of reference" which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s.15(1). at para.6.

fighting the evil of discrimination.⁴⁹ Each of these issues must be analyzed in a purposive manner, taking into account the full social, political and legal context of the claim.⁵⁰

The Court also describes the nature of the burden on a claimant to prove a violation of his or her claimant's dignity or freedom. The claimant is not required to adduce data, or other social science evidence not generally available. Although the Court recognizes that this may be of great assistance it is not required. The claimant does not need to prove any matters which cannot reasonably be expected to be within his or her knowledge. A court may often rely on judicial notice and logical reasoning alone:

There will frequently be instances in which a court may appropriately take judicial notice of some or all of the facts necessary to underpin a discrimination claim, and in which the court should engage in a process of logical reasoning from those facts to arrive at a finding that s.15(1) has been infringed as a matter of law.⁵¹

The court's central concern will be with whether a violation of human dignity has been established in light of the historical, social, political and legal context. It is up to the claimant to ensure that the court is made aware of this context in an appropriate manner.⁵²

(ii) Transforming the contextual inquiry

The emphasis on contextual analysis is very strong in the *Law* decision. It expands upon the requirement for a contextual analysis established in earlier cases. As a result, it has the potential to address a number of the deficiencies experienced with contextualizing equality claims to date. However, in itself this analytical framework is insufficient to facilitate a more transformative contextual inquiry that can be applied in a conscious, coherent and consistent fashion.

⁴⁹at para. 23.

⁵⁰at para. 30.

⁵¹ at para. 77.

⁵² at para. 83.

One of the strengths of the *Law* framework is the emphasis on the requirement to maintain a purposive and contextual approach throughout the stages of inquiry. Experience to date has shown that in many cases courts were unable to sustain a fully contextualized analysis beyond the determination of the relationship between a claimant and a ground of discrimination.

Another advance is that the Court provides guidelines rather than simple exhortations to consider the full social, political and legal context of a claim. The *Law* decision identifies four "points of reference" which are designed to assist a court in identifying and evaluating the relevant contextual factors. In particular, the focus on "pre-existing disadvantage" assists the court to consider the existing structural inequalities that shape the claim.

A third positive aspect is the focus on the perspective of the claimant. In many decisions, the perspective taken is grounded much more in the legislative context and the perspective of the government than that of the claimant's experience. This renewed focus on the claimant's perspective is assisted by the Court's recognition that a claim can be founded on a number of grounds at the same time. This may help to overcome a mechanistic approach to discrimination analysis.

If courts are able to fully implement these aspects of the decision, then contextualized analysis is likely to be fuller and more in keeping with substantive equality principles than it has in the past. One impressive application of the analytical framework established in *Law* is the *Lesiuk* case. In this case an Umpire established under the *Canada Employment Insurance Act* held that the differential impact of the definition of "major work force attachment" in the *Act* contravened s.15 of the Charter in that it constituted discrimination on the grounds of sex and parental status.⁵³ In reaching this decision, the Umpire found that "in order to avoid the risk of being unable to qualify for benefits, the part-time working mother with children under school age must pursue a work pattern traditionally adopted by men at the expense of her family responsibilities."⁵⁴

⁵³[2001] C.U.B.D. No.1 CUB 51142 (March 22, 2001).

⁵⁴at para 67.

In reaching this conclusion, the Umpire set out his reasons through a step by step application of *Law* as it had been pleaded by the claimant. He accepted expert evidence about the long term penalties felt by women who participate in the workforce on a part time basis, particularly as they contribute to women's poverty. Women do not make a simple "choice" to work part time. Rather this decision is "sculpted in particular by prevailing gender roles, the market and a variety of socio-historical influences".⁵⁵ The detailed facts about Ms.Lesiuk's work and family life also informed the decision in a meaningful way.

Despite these positive developments, there are still some obstacles to a fully contextualized analysis. One concern is that the conception of equality put forward in *Law* is problematic. *Law* builds on the link between equality and human dignity established in glowing terms in *Vriend*.⁵⁶ While human dignity, and the related emphasis on equal concern, respect and consideration, is undoubtedly an important aspect of human rights norms, it is a fairly limited conception of equality. In particular, it appears to be a highly individualistic concept, one that glosses over the relational nature of equality. In addition, it does not convey the material and structural aspects of inequality.

Clearly, the *Law* approach goes beyond a formal equality analysis and integrates both the obligations to refrain from discrimination and to promote equality. However, it does not amount to an enlarged conception of substantive equality. For example, it recognizes that a failure to take into account the claimant's already disadvantaged position can amount to an infringement of s.15. But the negative effect is described in terms of imposing a burden, withholding a benefit or otherwise perpetuating or promoting "the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration." This conception of equality does not require the courts to focus on the nature of structural inequality and its impact on individuals. The conception of equality is based foremost on an understanding of

⁵⁵at para 21-22.

⁵⁶[1998] 1 S.C.R. 493 .

discrimination as operating through stereotypes and assumptions, not through relations of power, patterns, practices and norms.⁵⁷

A second concern is that the *Law* decision provides little guidance about how the claimant's perspective is to be presented. With the exception of "pre-existing disadvantage," the factors outlined by the Court relate more to the effect of the impugned provision than the situation of the claimant and other members of her group. This emphasis could have the effect of keeping the contextual analysis focused on the relationship between the legislative context and the purpose of s.15. This reaffirms the current practice where the third contextual inquiry, the one surrounding the claimant and her claim is underdeveloped. In many s.15 cases, the real difficulties from the interplay between legislative context and factual context of the perspective of claimant. There is a tendency to treat the former as an objective interpretation of the law, and the latter as a secondary and subjective form of analysis.

Law stipulates that the claimant is not required to adduce data, or other social science evidence not generally available since the court may often be able to rely on judicial notice and logical reasoning alone. It remains up to the claimant to ensure that the court is made aware of this context in an appropriate manner. Little is said about how claimants should do this or about how courts can take the perspective of the claimant into account.

From this perspective, the approach taken by the majority in *R.D.S.* and discussed above is preferred because it provides a detailed approach to contextualized judging. In particular, the judgment emphasizes the need to take different perspectives into account, to refer to equality principles, as well as to critically reflect on one's own beliefs, opinions and experience, on those held more generally within society and on the contextualized evidence presented to the court. This judgment further notes that a number of sources, including self-reflection, can contribute to an understanding of the context or background which is essential to judging. While this construction of a "conscious contextualized

⁵⁷Although the court does state that it will "always be helpful for the claimant to identify a pattern of discrimination against a class of persons with traits similar to the claimant." *Law* at para.66.

inquiry" was developed in the context of the requirements of impartiality, it also provides a good basis for an approach to contextualized judging of s.15 claims.

When considered together the decisions in *Law* and *R.D.S.* constitute a renewal of the contextualized inquiry in s.15 claims. While there are clear advances over the original *Andrews/Turpin* test, more is required. In order to illustrate this point, one can ask whether the renewed contextual inquiry would address the problems outlined in the review of the *Symes* case. The discrepancies in the approaches taken and the determination made in the majority and dissenting reasons in this case can be attributed in large measure to differences in appreciating the relationship between the perspective of the claimant, the structural inequalities experienced by women as a group and the legislative scheme as a whole.

The majority required evidence of a direct relationship between the *Income Tax Act* and the adverse impact of childcare costs on women's equality. It was not prepared to accept at face value the evidence that the claimant paid childcare expenses. Instead, preference was given to constructing them as a family expense and thereby rendering the gendered aspects of the interpretation of business expenses invisible.⁵⁸ As a result, the majority discounted the claimant's perspective focusing almost entirely on the legislative scheme and in particular on a separate provision related to childcare expenses. This same discounting of the plaintiff's perspective occurred in the majority decisions in *Thibaudeau* and *Gould*.⁵⁹ It is difficult to see how the renewed contextual approach would have

⁵⁸Lahey, "Legal Personhood"; Johnson, "If Choice is the Answer". This is underscored by Iacobucci's comments that the result may have been different in another fact patterns, for example where the claimant was a single mother or a woman working part time with low earnings. (at 561).

⁵⁹*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571. In this case, Madeleine Gould's application for membership in the Yukon Order of Pioneers was denied because she was a woman. The majority of the Court held that there was not discrimination under the *Yukon Human Rights Act*, although L'Heureux-Dube and McLachlin, JJ dissented and would have found discrimination on the facts. In her case comment, Beverley Baines argues that the male judges were unable to see Ms.Gould's claim for what it was, that is a claim to human dignity, whereas the two women judges were able to understand the fundamental nature of Ms.Gould's claim. In effect, Justice LaForest's reasons amount to "really denying that being refused membership in the Pioneers had harmed Ms.Gould." Beverly Baines, "Discrimination Denied: *Gould v. Yukon Order of Pioneers* (2000) 12 *Canadian Journal of Women and the Law* 465, quote at 479.

changed the result in *Symes* given that it paid lip service to the perspective of the claimant throughout.

On the other hand, the dissenting opinions in these three cases all based their reasons on the perspective presented by the claimant. The dissenting judges were much more open to the contextualizing the claim by reference to the structural inequalities experienced by women. Some have argued that this ability to draw the relationship between the levels of contextualized analysis was partially intuitive.⁶⁰ However, an important distinction was the willingness of the dissenting judges to critically reflect upon existing social norms and their operation in the process of this contextual analysis. Contextualization reveals the problem of privilege and assists the court to understand the diversity of people's experiences.⁶¹

For example, in *Symes*, Justice L'Heureux-Dubé placed great emphasis on deconstructing the assumption that commercial needs have been defined in an objective and neutral manner. Her contextual analysis reveals that an interpretation of business expenses that exclude childcare expenses is one defined by the male norm.⁶² Such an interpretation ignores the reality that women bear a major responsibility for child-rearing and that the cost of child care is a major barrier to women's participation in the workforce. As a result, it is inconsistent with s.15. The proper interpretive approach to issues of equality recognizes that a real solution to discrimination cannot be arrived at without incorporating the perspective of the group suffering discrimination.

One can conclude from this analysis that the contextual inquiry should extend judicial scrutiny and reasoning to the operation of dominant norms and privilege and integrate excluded perspectives in a fundamental way. Transformative human rights principles can serve to enrich this analytical framework so as to facilitate this more conscious, reflective and inclusive inquiry.

⁶⁰Pothier, "M'Aider, Mayday".

⁶¹*Ibid.*

⁶²at 493.

Contextualized judging involves steps that are not unlike the narrative construction, deconstruction and reconstruction that take place during transformative mediation. The main difference is that the third party, the judge, carries out this exercise at a distance from the parties. She then sets out the reasons explicating this process and explicitly reconstructing the impugned law, policy or practice in light of equality norms. In a mediation process, the third party mediator, assists the parties to undertake this shared reasoning process themselves.

In litigation, the construction of the narrative occurs through the presentation of evidence. This process should be governed by the principles of participation and inclusion required by transformative human rights practices. Narratives are a form of communication especially well-suited to building an understanding of the experience of others. In the litigation context, they help to counter a judge's pre-understandings that result in false assumptions, stereotypical thinking, and a limited view of potential resolutions. Narratives are often the only way a judge can gain an adequate understanding of experiences and the needs of the claimant when she is differently situated. The duty to listen to the voices of those who are disadvantaged is an integral aspect of the right to equality: "The equality registered by rights claims is an equality of attention. The rights tradition...sustains the call that makes those in power at least listen."⁶³

The transformative approach involves a shift in perspective of the interpretive process to the claimant. For example, in "transformative sexual harassment jurisprudence", a contextual analysis of the impugned conduct would not simply assume as determinative the norms as set by the harasser, or others but be made from the "reasonable victim" standard which takes into account women's vulnerability.⁶⁴

⁶³Minow, *Making All the Difference*, at 309.

⁶⁴Gallivan, "Transformative Possibilities," at 58.

The primary focus on the claimant's narrative supports the effects-based emphasis developed and consistently applied in Justice L'Heureux-Dubé's reasons.⁶⁵ While the Court adopts some of aspects of this approach in *Law*, it does not go far enough in this respect. It is not the "ground of distinction" which is determinative, rather it is the *social context* of the distinction that matters. The "ground of distinction" is an abstract method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: "Does this distinction discriminate against this group of people?"⁶⁶ In maintaining the abstract concept of grounds as the focal point of analysis, *Law* is likely to perpetuate the distraction away from the claimant's perspective.

The transformative approach to rights practices, and to discourse on women's equality in particular, emphasizes the public nature of the discussion on realigning relations based on sex and the primary role of women themselves in articulating what is relevant to discussions of equal treatment.

Once a narrative or a set of narratives has been constructed, the court undertakes a process of deconstruction. This is a process of deliberation and reasoned argument in which a new meaning for these stories is derived from legal principles. As in transformative mediation, deconstruction involves actively resisting the operation of privilege and entitlements, addressing inequalities in deliberative practices, and appreciating structural inequalities.

Deconstruction is a critical reflective process which explores the relationship between de facto inequality and legal equality. In particular, it operates through close examination of the beliefs, assumptions and norms that shape the human rights conflict by scrutinizing equality claims in the

⁶⁵See for example *Egan v. Canada*, [1995] 2 S.C.R. 513, where she held that:

Awareness of, and sensitivity to, the realities of those experiencing the distinction is an important task that judges must undertake when evaluating the impact of the distinction on members of the affected group. Discrimination cannot be fully appreciated or addressed unless the courts' analysis focuses directly on the issue of whether these workers are victims of discrimination, rather than becoming distracted by ancillary issues such as "grounds", be they enumerated or analogous. (at 646)

⁶⁶*Ibid.*

whole factual context. Substantive equality analyses involve critical examinations of how difference is recognized, given meaning and valued. It focuses on relationships of inequality and the interaction between systems and structures that reproduce these inequalities. This requires a further shift away from analysis on the basis of grounds of gender, race, ability, class and so on and toward a direct examination of the whole equality picture surrounding the claimant and her claim.

Transformative practices could assist the courts in moving away from abstract notions of equality and toward critical reflection, that is the rethinking of basic premises and norms. The latter is key because, "Fundamentally an equality analysis ought to be about questioning basic premises to test whether they are consistent with constitutional norms."⁶⁷

The final step taken by the court in a contextual inquiry into a s.15 claim is to reconstruct the narrative in a manner that is consistent with equality principles. Here, the focus is on resolution rather than settlement and on the prospective consequences of the decision. This approach would go further than current equality analysis because rather than simply considering wider social conditions that causes laws to have unequal effects, reconstruction requires the court to consider how unequal social conditions can be changed.

This transformative shift is consistent with the principles of substantive equality. Courts need to directly and reflectively address the limitations of the formal equality framework. Given the pervasiveness of this antiquated approach, courts need to make this a conscious step in their equality analysis. For example, they could work through what formal equality would be satisfied with, but then go on to explicitly work out what substantive equality demands.

The first step is acknowledgment that there is a need for a fresh judicial approach to equality, one that is framed by the requirements of substantive equality, rather than being based on anti-discrimination.⁶⁸

⁶⁷Pothier, at 310.

⁶⁸David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years - What Progress? What Prospects?" (1997) 7 *National Journal of Constitutional Law* 263.

It also involves becoming more explicit that the enforcement of equality rights is a transformative exercise. By definition, equality claims seek to change existing mores insofar as they discriminate against a member or members of a target group. While the Supreme Court of Canada has been fairly consistent in taking this approach in the interpretation of human rights legislation, this is less true of Charter litigation.

Finally, it will require the high level of self awareness and constant questioning of the operation of power and privilege that was seen as integral to the nature of judging in the *R.D.S.* case. The starting point can not be that the perspective of the decision-maker is objective and neutral. Rather, judges and others involved in conflict resolution processes must consciously place priority on the context of the claimant in terms of the processes of lawyering and judging.

The Supreme Court has recognized that the correct approach to s.15 is a flexible and nuanced analysis, not a rigid test. The Court has also recognized the need for evolution and the adaptation of equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying fact situations.⁶⁹ Transformative human rights practices require change in our approach to judging at the attitudinal, analytic, and institutional levels. In terms of the contextualization of equality claims, it requires an integration of narrative insights into a more participatory, deliberative and reflective process of judicial interpretation.

A review of existing approaches to s.15 analysis reveals glimpses of transformative possibilities. This emerging potential can be enhanced so that it can become a coherent and consistent conscious contextualized inquiry. Some of the institutional and procedural aspects of these issues are explored further in the next section which focuses on the need to establish a public model of Charter litigation.

⁶⁹*Law*, at para.3.

6.3 A Transformative Model of Charter Litigation

A. A Public Model

A comprehensive approach is required for the implementation of transformative human rights practices in the courts. Just as a public theory of the rights vindication function is required at the analytical level, at a practical level the requirement is for a public model of litigation for Charter cases.⁷⁰

The private dispute resolution model is inadequate for rights adjudication because it does not take adequate account of the court's function in contributing to the development and application of shared, reflectively-held human rights norms. This function places a higher priority on the public interest⁷¹ and requires the development of transformative human rights practices that reflect this public nature.

In Charter cases, court procedures need to take into account the intrinsic relationship between the individual and systemic aspects contained within all human rights claims. For example, equality claims are at once a discrete injustice experienced by an individual or group of individuals, and hence have a private character. At the same time, they are rooted in larger patterns of social inequality, and hence are public.

In the Charter litigation context, the public interest has a dual nature. First, there is a public interest in resolving these individual cases and thereby contributing to the individual and societal experience of rights norms. This is the direct impact of litigation. Secondly, there is a public interest in the broader systemic impact on society's institutions and structures of human rights norms as they are refined through the adjudication. This is the indirect impact of rights litigation.

⁷⁰Here, I concentrate on Charter litigation and draw examples from mainly from section 15(1) claims because it provides a beneficial focus and clarity to the points being made. However, it could be argued that this model should be applied to all rights litigation. See the discussion in the next section on other types of rights litigation.

⁷¹See discussion on the need to recognize multiple public interests in Chapter 5 at footnote 44, which refers to both a generalized public interest as well as distinct particular public interests.

A public model of Charter litigation would fully reflect, protect and advance the dual private and public nature of the litigation. This does not require creating an entirely different way to litigate, such as adopting the inquisitorial or political forms of judicial review developed in continental European legal systems. Rather, it involves consciously adapting the current litigation model to meet the requirements of the transformative ideal.

It is important to re-emphasize the essential openness of procedural and institutional arrangements. Over the last few decades, courts have instituted a number of innovative arrangements to deal with specific classes of disputes such as family law, young offenders, small claims court and so on. Although the primary focus in civil justice reform has been on integrating "ADR" into the litigation process, the second most important sets of recommendations deal with the issue of tailoring litigation to different classes of disputes.⁷² Although these reform initiatives have focused solely on classes of 'private' civil disputes, it is argued here that a similar type of initiative is required for Charter litigation. Some interesting reform proposals were developed early on in the first years of Charter litigation⁷³, these have not been actively pursued and for the most part a "business as usual" attitude prevails.

A truly public system of Charter litigation would be fully consistent with the principles of transformative human rights practices. This involves enhancing the deliberative, participatory and reflective character of litigation practices. It requires developing mechanisms to increase the public and prospective nature of the process. A public model of litigation would facilitate the consideration of underlying causes so as to work toward resolution rather than simply settlement of the conflict. The process and outcome would both be consistent with equality norms.

From a procedural perspective, one primary focus should be on making the litigation process more inclusive and ensuring that it conforms with norms of equality. Courts could play a much larger role

⁷²See for example, Systems of Civil Justice Task Force Report, at 41.

⁷³See for example the essays in Robert Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987)

than they currently do in isolating and excluding the effects of power and privilege. This would involve, for example, taking active measure to equalize parties and to ensure that a broad spectrum of voices are heard. A second focus should be on enhancing the capacity of litigation to contribute to the transformation of interests and preferences through public, critically reflective participation in deliberative practices. The goal of reconstructing the approach to Charter litigation is the creation of a new equilibrium between individuals, groups and government which favours human rights.

Achieving this goal entails recognizing and addressing the different requirements of the rights vindication role. This change in focus could result, for example, in the promotion of different procedures, expanded types of group claims, further liberalization of standing and greater access to a variety of court procedures. Charter litigation requires courts to adapt procedures to deal with issues such as the public interest through issues such as party standing and intervener status, the structure of a hearing, procedures for gathering and considering evidence, costs, and remedies⁷⁴. At present, there are only sporadic and uneven, largely case-by-case attempts to deal with some of the requirements of rights vindication. A selected number of these issues are examined in the next section in order to illustrate potential elements of a public model of Charter litigation. However, what is actually required is a comprehensive approach that is consistent with transformative principles.

There are a number of ways in which a public model of Charter litigation could be instituted. Judges could continue to create these practices on an ongoing basis in individual cases through their application of the rules of their court and the common law. There is a great deal that individual judges can do through a conscious contextualized application of rules and common law principles. Many procedural innovations have developed in this manner and codified through rules at a later date. However, there are also clear limitations to this case-by-case approach. By definition, it is ad hoc and limited to specific procedural issues in a given case. Outcomes are therefore uneven and result in a patchwork of approaches rather than a comprehensive one. A preferable approach would be to amend the rules of procedure of the courts for this purpose. While this would have to be done on a

⁷⁴The issue of remedies is addressed in section 7.3.B.

court by court basis, the Supreme Court of Canada could play a leading role by establishing its own procedures for handling appeals in Charter cases. However, these developments are even more important at the trial level where evidence is generated.

The process undertaken to develop innovative procedures for Charter litigation is very important in itself. These are questions of important public policy. It is not enough for them to be resolved in *ad hoc* and often unarticulated decisions, resulting from hearings usually held in private.⁷⁵ There should be an opportunity for public consultation and an articulation of the reasons behind the changes.⁷⁶ A large number of lawyers, non-lawyers and public interest groups alike, have a great deal to offer in the course of the development of the new judicial function under the Charter.⁷⁷

The Canadian approach to date can be contrasted with the much more conscious and reflective debate in the United Kingdom. In that state, new human rights legislation incorporating the European Convention on Human Rights and creating justiciable human rights for the first time has been accompanied by ongoing public debate about appropriate procedures to carry out this new function.⁷⁸

⁷⁵In these sense that these are motions often heard in chambers rather than open court and often reasons are not given by the judge.

⁷⁶For example, rules relating to intervention were reformulated after discussion in the SCC-CBA Liaison Committee, not a broad public forum. See discussion in Kenneth P. Swan, "Intervention and Amicus Curiae Status in Charter Litigation" Sharpe (ed) *Charter Litigation*, 27-44, at 43.

⁷⁷*Ibid.*

⁷⁸The debate is an ongoing one and is an interesting example of the recognition of the need to match changes in the normative human rights order with court procedures to undertaken this function. Cooper and Marshall-Williams, *Legislating for Human Rights*.

This was also the approach taken in proposals to adopt a non-justiciable social charter in Britain, where the substantive legislation would have been accompanied by a code of practice. These proposals have not been enacted to date. N. Lewis and M. Seneviratne, "A Social Charter for Britain" in Coote (ed.), *The Welfare of Citizens: Developing New Social Rights* (1992).

This is not to say that the outcome of this debate in substnative terms has resulted in better procedures to date, only that the debate itself has been more reflective.

It may be that non-state actors could take the lead in developing a model code of procedure for Charter litigation within the public sphere.⁷⁹ Many reform attempts of this type have been initiated within civil society by bar associations or other justice-related organizations. These associations have the capacity to work through a broad consultative process. Proposals of this type can then be taken up by state actors such as the courts or legislatures which have the capacity to implement them.⁸⁰

B. Elements of a Transformative Model

The objective is to develop a comprehensive public model of litigation, focussing on Charter cases, that is consistent with the transformative ideal. This endeavour will involve reviewing all aspects of litigation procedures to determine the extent to which they comply with transformative human rights principles. This main theme is explored in this section with respect to a small number of elements of a transformative model of litigation. These elements are: procedures relating to the gathering and consideration of evidence; interventions; and public funding and costs.

(i) Evidence

One critical aspect of designing a public model of litigation is the nature of the process for gathering and reviewing the evidence upon which judges base their reasons. It is necessary to reconsider the sources, types and extent of evidence required in Charter cases. There are five stages in this type of litigation at which evidence should be adduced: (1) to interpret Charter provisions; (2) to prove violation of the Charter has occurred on the particular facts; (3) to determine the purpose, object, effect and operation of enactments; (4) to determined the reasonableness of a limit; and (5) to

⁷⁹For example, the Canadian Bar Association has produced a number of reports on justice system reform that have led to changes at the level of institutions, policies and procedures. These include reports on: Supreme Court of Canada reform, court reform, and reform of administrative tribunals.

⁸⁰It has long been suggested that legislatures pass secondary laws of adjudication that requires judges to use certain methods to decide certain kinds of cases. See for example, Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 96-99.

determine appropriate remedy. In several Charter cases, the Supreme Court of Canada has commented on the inadequate evidentiary record before them.⁸¹

Under the transformative model, this reconsideration is likely to involve a shift from the current relatively passive judicial role in which the parties exercise complete control over the development of the evidentiary record to a more active and interventionist one in which the court takes steps to ensure that it deliberates on the basis of a full record. A passive judge is less likely to discern the true merits of the case, by comparison with more active role taken by human rights commissions and tribunals.⁸²

At present, no mechanisms exist to ensure that all available relevant information is before the court, thus allowing it to make a fully informed decision. Judges are not actively engaged in evidence gathering functions. In addition, courts are seen to be ill-equipped to deal with new forms of evidence.⁸³ The costs of adducing evidence in Charter litigation is prohibitive for many parties and intervenors. Specific problems that have been identified with respect to proof of facts in Charter cases include: reliance on judicial notice; the taking of judicial notice when facts are contentious; insufficient evidence for section 1 determination; and the sparseness of empirical research undertaken to address specific issues in a given case.⁸⁴

One of the strongest concerns is the imbalance in resources between individuals challenging governmental action and those of the government seeking to justify limitations of Charter rights.⁸⁵

⁸¹For example, *Schacter v. Canada*, [1992] 2 S.C.R. 679.

⁸²Commissions can be more active, for example, by what types of evidence they look for during the investigation process. However, this may be more of potential inherent in human rights agencies than a reflection of practice. Some reports have recommended increasing this capacity, for example see the *Cornish Report*, at 128.

⁸³Kathleen Mahoney, "What do the courts want from the social sciences?" in *Charter Litigation*, 187-211.

⁸⁴B. Morgan, "Proof of Facts in Charter Litigation" in *Charter Litigation* 159-186, at 162-3.

⁸⁵Although in some cases, where a corporation is launching a Charter challenge it is often the government which is the less-endowed party.

A separate but related concern is the overwhelming financial resources of corporate litigants and their ability to shape the development of Charter jurisprudence. These imbalances go directly to the heart of the value of constitutionally-protected rights and reflect inequalities in the litigation process.

These difficulties are often characterized as a rationale to limit the role of courts. However, under the reconception proposed here, these become important issues of institutional design. Courts need to consciously construct a new approach to evidence in Charter cases. This will involve changes at a number of levels, including legal doctrine and analysis, rules of procedure, and other forms of institutional change.

An important first step is to consider the operation of equality and inequality in adversarial litigation. The myth of the capacity of the adversarial process to equalize the parties should be evaluated against the reality of what actually transpires in litigation. The myth of the positive ability of adversarialism to overcome power imbalances between the parties is often invoked as an argument against informal resolution processes. For example, Owen Fiss has argued that there is a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities.⁸⁶ Adjudication aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.

Within the formal adjudication process, procedural safeguards are seen to assist in addressing power imbalances between parties. These include:

- the act of applying rules, in and of itself;
- specific rules of civil procedure to limit prejudice by prescribing events that occur in the course of litigation;
- promotion of fairness more or less directly (i.e. equalizing parties knowledge or by requiring public trials);
- defining the scope of action;

⁸⁶"Against Settlement", at 1077.

- formalizing the presentation of evidence; and,
- reducing the strategic options for litigants and their counsel.⁸⁷

In contrast, many dispute resolution scholars have noted that concerns about unequal parties continue to exist in the context of adjudication. The ideal of adversarialism contemplates adversaries of roughly equal skill and economic support. Yet, the reality of unequal resources generally means that the 'haves' come out ahead.⁸⁸

The litigation system reflects the power structure of society and can be seen to perpetuate some of its injustices. This is particularly notable in patterns of access to and usage of the courts. Those who most need it are often unable to avail themselves of the court's protection. In addition, even where parties are able to access the courts they find that the structure of litigation can further aggravate inequalities. The adversary system and the expensive details of its use exacerbate any pre-existing social power differentials.⁸⁹

In practice, litigation is not conspicuously successful at rectifying power imbalances:

Given the sometimes vast disparities of resources in the formal litigation arena, it seems odd to argue that adjudication is a better democratic leveller [than informal dispute resolution methods]. Perhaps this would be true if most cases were heard by Fissian judicial power balancers, but even in those few cases that are heard by judges (and juries), it is often private (not public) resources, rather than justice, or evenly matched "public discourse" which control case presentation, mobilization of proof, and thus victory.⁹⁰

In fact, many procedural safeguards that were meant to make the adversarial system more equitable, generally referred to as the "due process revolution", have resulted in more expensive, complex, and

⁸⁷Delgado et al, "Fairness and Formality", at 1374-75.

⁸⁸C. Menkel-Meadow, "The Trouble with the Adversary System", *supra*, at 22-23.

⁸⁹*Id.*, at 29-30.

⁹⁰C.Menkel-Meadow, "Whose Dispute Is It Anyway?" at 2687-8 (footnotes omitted from quote).

formal hearings. As a consequence, many forms of adjudicative and administrative justice have become even more remote and inaccessible to would-be claimants.⁹¹

While the judicial reasoning process itself excludes consideration of power and is based on the merits of the argument, the adversarial process leading up to this deliberation does not satisfy transformative principles. Reforms should be aimed at making "Fissian judicial power balancers" a reality. A number of steps could be taken toward this end.

At the analytic level, evidentiary doctrines could be developed to proactively address imbalances of power within Charter litigation. One of the simplest steps pertains to the courts' approach to limitations of Charter rights by consistently ensuring that governments are held to a strict burden of proof under s.1. This appeared to be the Supreme Court's approach when it established the reasonable limitations test in *Oakes*.⁹² However, the Court has been inconsistent in its application of this test and has often taken judicial notice of the reasonableness of a limit rather than requiring governments to prove all of the elements.⁹³ In addition, the Court has yet to sufficiently expound the meaning of the phrase "demonstrably justified in a free and democratic society" as it has focused on the concept of reasonableness.

An alternative to the current section 1 balancing test would be to establish a presumption of "unconstitutionality."⁹⁴ Once a claimant had satisfied the court that a right has been infringed, the infringement would be considered unconstitutional, unless and until the government had overcome this presumption by proving that it is a "reasonable limit demonstrably justified in a free and democratic society." The Court would need to advance a theory of a "free and democratic society"

⁹¹*Ibid.*

⁹²[1986] 1 S.C.R. 103.

⁹³For an overview of the operation of this test in section 15 cases, see Martin, "Balancing Individual Rights to Equality and Social Goals."

⁹⁴At present there is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory. *Law* at para.67.

perhaps in line with the constitutional principles framework which it has begun to develop.⁹⁵ As discussed in this paper, equality is an integral aspect of democracy and should be recognized as a foundational principle. The main advantage of this presumption, like the existing presumption of constitutionality in division of powers adjudication, is to ensure the best possible factual record is before the court.⁹⁶

This proposed approach is important even in cases where the government is in a position of defending a legislative provision that is aimed at ameliorating the situation of one group from a Charter challenge. This scenario has arisen for example in the criminal law context in challenges to obscenity provisions⁹⁷ and to the treatment of confidential records in a sexual assault cases.⁹⁸ The requirement for the government to fully prove how it took equality norms (or other human rights norms) into consideration during the policy-making or legislative process will strengthen the court's ability to interpret and apply rights..

In the early days of the Charter, it was suggested that since s.1 requires that the reasonableness of a limit must be "demonstrably justified", the traditional rules of judicial notice should not apply.⁹⁹ However, the courts have not adopted this approach. Consistently insisting upon proof under s.1 alone would mean a drastic change in court practice, supplying evidence where judicial notice has often stood alone. Avoiding reasoning on the basis of judicial notice alone contributes to more reflective and deliberative practices within the litigation process. This approach to s.1 could also have

⁹⁵As noted in Chapter 3, there is already a basis for this in the decision in *Oakes*. However, the Court has not had the opportunity to further refine these concepts to date.

⁹⁶J. Magnet, "The Presumption of Constitutionality" (1980), 18 *Osgoode Hall L.J.* 87; "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 *Manitoba Law Journal* 21.

⁹⁷*R. v. Butler*, [1992] 1 S.C.R. 452.

⁹⁸*O'Connor, Mills*.

⁹⁹R.J. Rolls, "The Use of Evidence in Charter Litigation" *A Practical View of the Charter for Barristers and Solicitors* (UCLS, Continuing Legal Education, 1986) at 1.

a positive effect on legislative practices since it would encourage legislators to reflect and debate upon human rights norms in their law-making functions.

Institutional reforms would center around the development of a greater and more independent fact-finding ability on the part of the courts. Proposals for reform have included a move toward more inquisitorial methods of gathering information and/or a splitting of the information-gathering and decision-making functions of the courts in Charter cases.¹⁰⁰ One specific suggestion is that early in the litigation process an evaluation of the requirements of evidence should be undertaken by a judge or officer of the court, possibly with the assistance of social scientists.¹⁰¹ This would ensure that parties were fully aware of the courts' requirements and any additional means to attain the required evidence would be part of the public process.

Reforms of this type amount to a fundamental shift in adversarial litigation because the court assumes a greater control over the evidentiary record. Traditionally, this the creation of the record is completely within the control of the parties. The recommendation here is that parties would continue to have an important role in this process but that the court would take on additional responsibilities in this regard. Sharing the evidence-gathering function would assist in the creation of a more deliberative and participatory process.

It should be noted that a shift of this type is already occurring in many jurisdictions through the implementation of case management. These management methods involve, in part, judges or other court officers working with the parties to shape the pre-trial and trial processes in order to make them more efficient. In the public model, the emphasis is on the quality of the record rather than the time involved. In fact, rather than restricting evidence, this approach could potentially lead to the generation of a greater amount of evidence, but one tailored to requirements of Charter cases. This

¹⁰⁰See discussion in Sharma, "The Adequacy of the Adversarial System".

¹⁰¹M. Pilkington "Equipping the Courts to Handle Constitutional Issues: The Adequacy of the Adversary System and Its Techniques of Proof" (Special Lectures: Applying the Law of Evidence - Tactics and Techniques for the 90s, Law Society of Upper Canada) at 53.

is completely consistent with a public model of litigation, recognizing that the outcome of a Charter case has implications that extends far beyond the parties.

As this brief discussion makes clear, analytic, procedural and institutional changes can either increase or decrease access and resource imbalances between the parties depending on a number of factors, including the facts of the case. Transformative principles must be at the forefront of developing and implementing new approaches to evidence in a public model of Charter litigation in order to make the process more inclusive and equitable.

In addition, at the trial level, reforms will have to include finding ways to weave the narrative insights discussed above into the litigation process. This involves evidentiary and procedural changes to facilitate the incorporation of stories into the process. Judges must develop their capacity to listen to the claimant's stories.¹⁰² In the context of sex discrimination, this means truly hearing the voices of women. This is the requisite first step in making sense of a claim.

Traditional litigation approaches are insufficient. Trials are unsatisfactory fora for telling stories:

Trials also fail to provide a forum for victims to tell the entire story of what they have experienced in an unfiltered and safe environment. Some victims might choose not to testify for fear of being attacked on cross-examination. The adversarial nature of the trial involves several procedures that detract from the victim's opportunity to tell her story.¹⁰³

Many plaintiffs or complainants discover only after becoming involved in the lawsuit that their day in court will not provide them with an opportunity to convey the pain they have suffered. The focus is often more on recovery rather than an opportunity to tell the court and to the public that they have

¹⁰²Sheppard, "Caring and Human Relations", at 335.

¹⁰³Wacks, at 217.

been wronged.¹⁰⁴ Crafting the story to satisfy the requirements of pleading "can rob the victim's experience of its humanity."¹⁰⁵

At least two types of reform are required here. First, rules of evidence need to be amended to permit claimants to tell their stories in a narrative form. Secondly, a more interactive process between adjudicator and claimant is needed. Lawyering and judging practices will also have to change. Lawyers could have an important role in helping "judges to see the parties as human beings" and in removing "the separation between judges and litigant."¹⁰⁶ Judges will have to develop a "special ability to listen with connection before engaging in the separation that accompanies judgment."¹⁰⁷ Justice Bertha Wilson has endorsed this approach, adding:

Obviously, this is not an easy role for the judge -- to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge. But I think we have to do it or at least make an earnest attempt to do it.¹⁰⁸

In sex equality claims, the focus is not simply of increasing the capacity of the courts to hear the claimant's voices but women's voices as a group. This requirement leads into a second element of the public model of Charter litigation, the role of interveners.

¹⁰⁴*Ibid.*

¹⁰⁵*Id.*, at 218.

¹⁰⁶P.Cain, "Good and Bad Bias: A Comment on Feminist Theory and Judging" (1988) 61 *California L.Re.* 1945 at 1954.

¹⁰⁷*Id.*

¹⁰⁸B.Wilson, "Will Women Judges Really Make a Difference?" The Fourth Annual Barbara Betcherman Memorial Lecture, Osgoode Hall Law School, York University, February 8, 1992, at 22.

(ii) Interventions

Another way to approach the issue of ensuring that the litigation process is more participatory and deliberative is to review procedures and practices with respect to standing and interventions. Over the last several decades, Canadian courts have developed a very broad and inclusive approach to standing.¹⁰⁹ This same approach has not carried over to the role of intervenors in Charter litigation. Interventions are an important mechanism to make the litigation process more inclusive. The transformative approach requires the development of a culture of interventions that facilitates the inclusion of a spectrum of voices in the dialogue about the meaning and potential impact of an interpretation of a human rights norm. Interventions are one of the central mechanisms for affirming the public nature of these cases. They allow for numerous expressions of the "public interest" and a dialogue about the range of stories and counter-stories related to the legal issues under consideration.

This section briefly reviews the practice of the Supreme Court of Canada with respect to interventions in order to contrast current practice with a transformative one. Although the absolute number of intervenors in Charter cases at Supreme Court of Canada level has grown over the last decade, the Court's approach suggests the need for an intervention policy and approach that takes into consideration the transformative requirements of human rights practices.

In 1983, shortly after the Charter was repatriated, the Supreme Court of Canada Rules provided that judges had a broad discretion with respect to granting leave to any person interested in an appeal or a reference. In addition, any intervenor in the courts below had an automatic right to intervene at the Supreme Court of Canada. This latter provision was in force for less than a year.¹¹⁰ The Court's limited approach to allowing interventions led to several groups submitting concerns and suggestions

¹⁰⁹See, for example, Swan, at 28.

¹¹⁰Rule 18, SOR/83/930.

for reform.¹¹¹ The Supreme Court referred this issue its liaison committee with the Canadian Bar Association which recommended a redrafting of Rule 18.

Following this limited process in 1987, the Supreme Court of Canada's rule on interventions was amended to provide a more detailed process for applications for leave to appeal.¹¹² Of particular note is the requirement that persons seeking leave to intervene set out their "interest" in the matter and their reasons for believing that their submissions will be "different and useful" to the Court.¹¹³ The discretion of judge who hears the application for leave to intervene remains central to Rule 18.

The "different and useful" test is an onerous one.¹¹⁴ In addition, various statements by members of the Supreme Court of Canada in the last few years have signalled the Court's view that it will be

¹¹¹Canadian Civil Liberties Association, BC Civil Liberties Association, Women's Legal Education and Action Fund (LEAF) and the Canadian Labour Congress. See discussion in Bryden, "Public Interest Intervention".

¹¹²SOR/87-292, Canada Gazette Part II, Vol. 121, no. 12.

¹¹³ Rule 18 now provides:

- (1) Any person interested in an appeal or a reference may, by leave of a judge of the Court, intervene therein upon such terms and conditions and with such rights and privileges as the judge may determine.
- (2) All applications to intervene shall be made by notice of motion supported by affidavit on a date to be fixed by the registrar, within 30 days after the filing of the notice of appeal.
- (3) The application for intervention shall briefly
 - (a) describe the intervener and the intervener's interest in the appeal;
 - (b) identify the position to be taken by the intervener on the appeal;
 - (c) set out the submissions to be advanced by the intervener, their relevancy to the case, and the reasons for believing that the submissions will be different and useful to the Court.
- (4) An intervener has the right to file a factum. Unless otherwise ordered
 - (a) the factum of the intervener shall not exceed 20 pages;
 - (b) the intervener shall be bound by the case on appeal and may not add to the record, and
 - (c) the intervener shall not present oral argument.
- (5) The order granting an intervention shall specify the filing dates for the factum of the intervener and shall, unless there are exceptional circumstances, make an order as to additional disbursements incurred as a result of the intervention.

¹¹⁴See for example, Honourable Mr. Justice John Sopinka, "Intervention" *The Advocate* 883. These views were from an address when Sopinka J, was still a member of the bar of Ontario and it represented his views at the time.

stricter in granting leave to intervene and in particular in allowing interveners to make oral submissions. These comments were crystallized in a recent notice to the profession.¹¹⁵ The Notice states the Court's intention to deal with all applications for leave to intervene together and to strictly enforce deadlines. In addition, it reminds interveners that the opportunity to make oral submissions will only be granted in exceptional circumstances. The Notice emphasizes that "proposed interveners are requested in their application, to state precisely the point in the intervention that is likely to be different from those likely to be made by parties or other interveners." It concludes that: "The strict enforcement of Rule 18 will ensure that the interests of both parties and interveners are safeguarded." Despite the chilling effect of this Notice, the vast majority of interveners applications are being granted and the vast majority of those who are granted leave are allowed to make a 10 minute oral submission in addition to their 20-page written factum.

Persons or organizations seeking leave to intervene at the Supreme Court of Canada must pass two tests: the "interest test" which requires that an applicant seeking leave to intervene have a sufficient interest in the dispute before the court, and the "adequate representation" test, which permits intervention only when the applicant's argument will not be adequately represented or argued by the parties to the dispute.¹¹⁶ The capacity to meet these tests is hindered by the fact that few judges issue written reasons explaining why leave has been granted or denied.

A review of few available written decisions by Sopinka J. concludes that four criteria can be discerned. These are: "interest" and "useful and different" submissions; the nature of the proceedings; the character of the applicant; and the consent of the parties.¹¹⁷ It is difficult to discern the rationale behind the court's treatment of intervention applications.¹¹⁸ While there appears to be a relatively low

¹¹⁵ Notice to the Profession, August 1999, Intervention.

¹¹⁶Sharon Lavine, "Advocating Values: Public Interest Intervention in *Charter* Litigation" 2 *NJCL* 27, at 41-2.

¹¹⁷*Id.*, at 43-4.

¹¹⁸Swan, at 35.

threshold for granting leave applications in Charter cases, the "anti-intervention view," as exhibited in the Notice to the Profession is palpable.¹¹⁹

The Canadian practice to date can be unfavourably compared with the practice of the United States Supreme Court. The latter has an open-door policy for all amicus briefs. These briefs can raise any legal issues or ideas related to the case, whether or not they have been introduced by the parties. An intervener may file a brief with the written consent of the principal parties and in the absence of such consent may seek leave from the Court.¹²⁰ For decades the Court has put pressure on parties, particularly the Solicitor General, to consent to interventions.¹²¹ The result is that principal parties now rarely object to participation by interveners in cases of public importance.¹²² Intervenors do not make oral submissions, but the briefs can be voluminous. This practice has had a huge impact on US public law particularly by providing background information to the Court that "has revealed in a particularly telling manner the impact that a legal doctrine has on the people the group represents"¹²³ This practice is seen as an important way to provide access to the courts for people as well as ideas and to create channels of communication with the court.¹²⁴

The Supreme Court of Canada's approach can be criticized on a number of grounds stemming from transformative human rights principles. First, it negates the value of participation in itself by requiring interveners to show that they have interests that are distinct from those of the parties. In the same way, it works toward excluding rather than including all parties that are affected by a claim.

¹¹⁹One particularly troubling statement is Cory J.'s view that he could not deal with the issue of judicial notice because was an argument presented by an intervener and not one of the parties. *R.D.S.* (at para. 122)

¹²⁰Sup.Ct. Rules 36.

¹²¹See, e.g. *On Lee v. United State*, 343 U.S. 924 (1951); Order Adopting Revised Rules of the Supreme Court, 346 US 945, at 947 (1954).

¹²²Swan, at 39.

¹²³Bryden, at 507-8.

¹²⁴Judge Jack Weinstein, "Litigation Seeking Changes in Public Behaviour and Institutions - Some Views on Participation (1980), 13 *U.C. Davis L. Rev.* 231, at 246.

In addition, rather than enhancing equality norms, it creates further imbalances since all governments have a right to intervene as of right and in fact have a right to be notified of litigation involving a constitutional challenge. Thus interventions are an automatic vehicle for the state perspectives while non-governmental perspectives depend on the willingness of the courts to let their voices be heard.¹²⁵ The deliberative quality of judicial decision-making, and hence the outcome, is enhanced by ensuring a multiplicity of perspectives.

Steps must be taken to develop a more sophisticated culture of interventions. One important starting point is a better understanding of the differences between various types of interventions. At least three forms of interventions can be identified. These are: party intervention (where interveners are primarily interested in the outcome of particular lawsuit and all issues that have an impact on them); public interest intervention (where interveners are interested in the legal issues raised by the case and advocate a position) and amicus curiae (intervenors who act as neutral legal advisers).¹²⁶ The judiciary is conditioned by the perception that non-parties should adopt a neutral role. Therefore, it is not surprising that many judges fail to find much merit in public interest group participation in litigation.¹²⁷

Much of the Supreme Court of Canada's reluctance to open up to further participation by interveners is based on concern for the parties. This is especially notable in criminal litigation. However, this reflects an "arguably anachronistic view" of the Supreme Court's role.¹²⁸ The public nature of Charter litigation requires greater popular access to the justice system and greater access by judges to different perspectives and influences. The Supreme Court is also concerned about efficiency and the use of court resources required to process these applications and deal with the submissions once leave is

¹²⁵J. Welch, "No Room at the Top: Interest Group Intervenors and charter Litigation in the Supreme Court of Canada (1985) 43 U.T. Faculty L. Rev. 204, at 223-7.

¹²⁶Bryden, "Public Interest Intervention".

¹²⁷*Id.*, at 500.

¹²⁸Welch, at 213-4.

granted. However, these concerns can be addressed through the structuring of the pre-hearing and hearing processes. Efficiency concerns need to be counterbalanced by the qualitative benefit of broad participation in Charter appeals.

The Court should develop a new rule on interventions based on clear policy statement on the status of various kinds of interventions. Public interest interventions should be welcomed as a "vital part of a mature constitutional adjudication system."¹²⁹ Procedural aspects of interventions should be developed on a collaborative basis with civil society and institutional interveners. Rules and procedures should reflect the importance of interventions and be consistent with transformative principles.

In addition to welcoming interveners, the courts could consider more actively seeking out friends of the court to provide missing perspectives. This is foreseen in provisions such as court rules pertaining to retaining counsel.¹³⁰ Institutions such as law reform commissions¹³¹ and human rights commissions could be called upon to round out public interest perspectives.

Finally, greater emphasis should be placed on the role Attorney-General as guardian of the public interest rather than simply as defender of the government.¹³² There is a vital need to reassess the role of the office of Attorney General in light of the Charter. The Attorney General is entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation.¹³³ The constitutional duty to ensure that the wider public interest is adequately represented is central to the Attorney General's mandate. It is not enough to assume that a public spirited citizen or interest group

¹²⁹Swan, at 41.

¹³⁰Most courts, including the SCC, already have this power in their rules of procedure.

¹³¹D.Gibson, "Judges as Legislators: Not Whether But How" (1987) 25 *Alta. L. Rev.* 74.

¹³²J. L. L. Edwards, "The Attorney General and the Charter of Rights" in R. Sharpe, *Charter Litigation* (Toronto: Butterworths, 1987, 45-68. See also more generally Edwards, *The Attorney General, Politics and the Public Interest* (1984). See also discussion in Bryden, at 492-494.

¹³³Edwards, at 52.

will step forward to assert a Charter challenge or intervene in one. Even funding these challenges is insufficient recognition of the government's duty to protect and promote the constitution.

The public interest function could be carried out directly by the Attorney-Generals including by active representation in the courts to argue the case on behalf of the public interest.¹³⁴ The government of the day's more restricted interests could be adequately represented through others, possibly the Solicitor-General.¹³⁵ Given the current governmental structures, this redefinition of the role of the Attorney General appears unlikely, at least in the short term. As a result it may be necessary to consider the establishment of another public office mandated with this function of guardian of the public interest in the Charter.

This type of institutional development would underscore the government's responsibility for implementing Charter rights and provide an additional avenue for carrying it out. Various UN Committees have commented on the contradictions between the Canadian government's responsibility to promote equality and the arguments it puts forward in Charter cases which tend to negate this responsibility.¹³⁶ However, this development would not replace the need for a broad approach to interventions. The transformative potential of Charter litigation is enhanced by the communication of a multiplicity of perspectives on human rights norms within the litigation process.

iii) Public Funding and Costs

Litigation is an expensive avenue. Canadian governments have recognized the public value of Charter and other types of litigation and established a number of test-case funds to assist claimants. At the federal level these include the Court Challenges Program and test-case funding administered

¹³⁴*Id.*, at 53.

¹³⁵*Ibid.*

¹³⁶See for example, Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/1/Add.31 (4 December 1998).

by the Department of Indian and Northern Affairs. Some provincial legal aid schemes also fund public interest litigation¹³⁷, in some cases establishing separate legal clinics for this purpose.¹³⁸ Public funding is the most direct way to recognize the broad public interest in the vindication of rights. Initiatives of this type are essential to ensuring that the Charter is meaningful. More can and should be done. For example the Court Challenges Program's current funding capability in the area of equality rights is limited to s.15 cases challenging federal laws, policies and practices and should be expanded to include provincial jurisdictions.¹³⁹

In addition to these funding schemes, some of the procedural changes discussed above could have the indirect effect of reducing the cost of Charter litigation. An additional mechanism is through the development of rules or practices related to costs. These issues can have a huge impact on access to the courts.¹⁴⁰ In Canada, the traditional rule is that "costs follow the event" or "costs in the cause", meaning that the losing party is liable for a portion of the winning party's litigation costs.

The "costs in the cause" approach is a serious disincentive for parties to undertake actions. While public interest parties may be able to find some funding for disbursements and lawyers to work at reduced fees or to provide their services at no cost, the spectre of facing a cost award at the end of the day is an additional hurdle.¹⁴¹ Interveners can also have costs awarded against them. Of course, there is always the possibility that claimant will be awarded costs and thereby recover some of the monies she has spent. On the whole though, the potential impact of a negative cost award is much harsher

¹³⁷For example, Legal Aid Ontario has a substantial test-case fund.

¹³⁸In some cases these legal clinics have a specific focus, for example the African-Canadian Legal Aid Clinic in Toronto. The Manitoba Public Interest Law Center is affiliated with Manitoba Legal Aid but does not receive any funding from the government in order to ensure complete independence.

¹³⁹The Court Challenges Program is actively seeking to expand its funding base so that it has the capacity to fund challenges to provincial legislation as well. The United Nations Committee on Economic, Social and Cultural Rights has recommended this expansion, as have a number of others.

¹⁴⁰*Systems of Civil Justice Task Force Report*, at 46.

¹⁴¹Arne Peltz, "Deep Discount Justice" (Winnipeg: Court Challenges Program, 1998).

than the possibility of a positive award. On balance, the current approach acts as a barrier rather than an incentive to public interest litigants. Similarly, it would not take long for awards of even modest costs against interveners to thwart the ability of public interest groups to undertake this important work.

A number of reform proposals have been made to reform the law of costs as it operates in the context of Charter litigation. One proposal is for the adoption of a "one-way rule"¹⁴² whereby costs are granted to the unsuccessful challenger in recognition of the public benefit of having the issue ventilated, sometimes with Parliamentary reform as a by-product.¹⁴³ If a "one-way rule" were broadly adopted by the courts it "could amount to a "judicial legal aid program" in that needy cases of public importance, especially when litigated against the government or a public body, would be judicially screened and publicly funded."¹⁴⁴

The Ontario Law Reform Commission has recommended a variation of the "one-way rule" that would be applicable where the litigation raises issues beyond the immediate interests of the parties, the litigation would not be justifiable on ordinary economic grounds to the claimant personally, and the defendant's resources are clearly superior.¹⁴⁵ In these circumstances, the Commission recommended that the claimant would receive costs if she succeeded, but be protected from costs if she lost.

A more modest approach is to import into Canada the American "no-way rule," where there are no cost awards regardless of the outcome of litigation. This is seen to increase access to the courts in

¹⁴²*Id.*, at 9.

¹⁴³Friedlander, "Costs and the Public Interest Litigant" (1995) 40 McGill L.J. 55 at 74-77 citing *Schacter v. Canada (Minister of Employment and Immigration)* [1992] 2 S.C.R. 679 and *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1988) 47 D.L.R. (4th) 388 (Dist. Ct.) aff'd as to costs (1992) 96 D.L.R. (4th) 45 (C.A.)

¹⁴⁴Peltz, at 11.

¹⁴⁵Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

the United States.¹⁴⁶ At a minimum, it would relieve public interest litigants' anxiety concerning potentially burdensome cost award.

At present, the "costs in the cause" approach is still the common practice in Canadian courts. However, there is increased confusion and uncertainty as courts struggle to address issues of access and fairness.¹⁴⁷ There is longstanding precedent for declining to award costs against an unsuccessful party where the case raised a novel point of law, was a test case or in some other respect benefitted the public. The recommendation here is that the recognition of a public interest costs exemption "would simply transform in appropriate cases this broad discretion to grant relief into a judicial mandate."¹⁴⁸

This section has touched on a few of the issues that should be considered in developing a public model of Charter litigation. Transformative human rights principles provide a framework that can assist in classifying these cases, distinguishing them from other types of cases and developing a method for measuring the relative strengths of the reasons for rules and guidelines for Charter litigation. Proceeding in a comprehensive manner is to be preferred as ad hoc steps can appear arbitrary and lead to discrepancies in results. In addition to focusing on the principles of deliberation and participation, the public nature of Charter litigation and the requirement to work towards substantive equality in litigation practices, there is a need for creativity. Legal institutions, like all institutions, are essentially open to change. It is important not to "retreat into traditional modes of thought about the nature of litigation."¹⁴⁹ Rather, the focus should be on the quality of law as a social learning process and prospectively at the transformative potential of what could be.

¹⁴⁶Peltz, at 12.

¹⁴⁷Friedlander, "Towards a Costs Awards Policy in Civil *Charter* Litigation" (1994) 5 *Windsor Review of Legal and Social Issues* 41.

¹⁴⁸Tollefson, "When the "Public Interest" Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 *U.B.C.L.Rev.* 303 at 336.

¹⁴⁹Peltz, at 15.

6.4 Multiple Litigation Discourses

Integrating the transformative ideal into the court system requires action on several practical fronts. The first focus is on the development of a public law model for Charter litigation discussed in the previous section. A second focus recognizes the ways in which courts play an important role in applying rights norms in a much greater range of cases. This latter focus is discussed in terms of the need to foster multiple litigation discourses.

In reviewing the record of the Supreme Court of Canada with respect to women's right to equality, it can be argued that the impact of the principle or value of equality has been much more dramatic in non-constitutional cases, through common law developments. This argument can be sustained with respect to at least three cases. These are: *Norberg* where the Court wove an understanding of the nature of inequality between a male physician and his female patient into its application of the tort of battery¹⁵⁰; *Moge* where the Court wove an understanding of the complex nature of women's economic inequality into its consideration of the law of spousal support¹⁵¹; and, *Lavallee* where expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.¹⁵²

¹⁵⁰*Norberg v. Wynrib*, (1992) 92 D.L.R.(4th) 449. In this case, a physician prescribed a drug to a patient who was addicted in exchange for sexual favours. The Court held that in view of the inequality of power between the parties, her dependence on the drug and the exploitative nature of the relationship, her consent to the sexual acts was not voluntary. *McLachlin and L'Heureux-Dube JJ*, would have gone further and extended this understanding of inequality into the concept of breach of fiduciary duty.

¹⁵¹*Moge v. Moge*, [1992] 3 S.C.R. 813. The issue was whether the claimant was entitled to continuing spousal support although the law required her to become financially independent. In particular, the Court highlighted the relationship between systemic and individual aspects of inequality by recognizing the fact that "the feminization of poverty is an entrenched social phenomenon" (at 853) and that "Given the multiplicity of economic barriers women face in society, decline into poverty cannot be attributed entirely to the financial burdens arising from the dissolution of marriage...However, there is no doubt that divorce and its economic effects are playing a role" (at 854).

¹⁵²*R. v. Lavallee* [1990] 1 S.C.R. 852. In this case, the legal principle itself was informed by the social context of women's experiences of domestic violence. The Court did not decide how the legal principle applied in Ms. Lavallee's case, this was sent back to the trial judge for decision.

These three decisions are all grounded in a highly contextualized approach, that is in the reality of the day to day experiences of women. They use equality principles in a transformative manner to bring about a re-evaluation of some basic assumptions embedded in a particular area of law, practice or societal norms in a way that leads to reformulation of the legal principle itself. They all involve a conscious and reflective scrutiny of the underlying assumptions and societal norms to uncover the ways in which they flow from or reinforce stereotyping and relegation to secondary status of women. The greater transformative impact of these common law developments may be explained, at least in part, by the fact that in these cases the indirect application of equality norms is not limited by the requirements of discrimination analysis under s.15 and is therefore conducive to a broad and substantive conception of equality.

The strength of this jurisprudence underscores the importance of fostering multiple rights litigation discourses. Equality norms can be developed in many different contexts, not simply under Charter litigation. Given the multifaceted and all-encompassing nature of structural inequality, many avenues will have to be pursued in order to achieve social justice. Two other types of litigation discourse are briefly reviewed in this section. These are: renewing efforts to develop tort law on discrimination and harnessing the potential of class action proceedings. Much of the discussion in this section pertains more directly to legal practice than court procedure since exploring these transformative possibilities will require creative lawyering as well as an open-minded judiciary.

A. Toward Torts of Discrimination

One of the most exciting recent legal developments relating to women's equality is the claimant's victory in the *Jane Doe* case.¹⁵³ In this case, Jane Doe sued the Toronto Police Force for failing to warn her concerning a serial rapist who eventually raped her at knife point. She was successful in arguing that the police were negligent in the way they investigated the serial rapes and that they breached their statutory duty to protect the public, including the failure to warn. She was successful

¹⁵³*Doe v. Metropolitan Toronto (Municipality) Commissioner of Police* (1998) 39 OR. (3d) 486 (Gen. Div.).

in integrating Charter arguments into her case in two ways. First, s.15 was engaged because the ways the police understood and investigated sexual assault was based on sexist stereotypes. Secondly, s.7 was engaged because they were basically using women as bait. She was awarded monetary damages and the trial judge's specifically referred to the duty to address the systemic aspects of the claim.¹⁵⁴ The decision did in fact lead to an audit of policing practices and the implementation of some reforms.

Of particular interest in the context of the discussion here is that although the *Jane Doe* case was decided on a s.15 basis it incorporates the legal language and concepts of negligence into the reasoning. As such, it opens up the possibility of imbuing this common law concept with equality principles. As a result, this case can also be seen to have an important precedent value in the role of equality rights in shaping our understanding of the responsibilities of public authorities and potentially, toward the development of a tort of negligence in the context of discriminatory behaviour. The *Jane Doe* case comes close to creating a tort of discrimination. The decision stands for the principle that it would be negligent to have stereotypical assumptions about certain groups and base your actions on those assumptions where they result in causing harm to another person. This could be characterized as a tort of discrimination, although the judge did not have to take this route since she was able to rely on a direct application of sections 7 and 15 of the Charter.

Steps to further develop a tort or specific torts of discrimination may be considered a priority legal strategy. Developments in this regard would extend the duty of non-discrimination to a greater range of private and public actors and to more varied fact situations. It would mean that it is negligent to act in a discriminatory manner, in the same way that it is negligent to take actions that are inconsistent with other duties of care we owe to one another.

¹⁵⁴The trial judge stated: "I should add that the chief of Police is responsible to see the members of his force carry out their duties properly and will be vicariously liable when they fail to do so as will the Board of Commissioners of Police which is charged with the overall responsibility of policing and maintaining law and order". (at 534)

There had never been a common law or statutory basis for a civil cause of action in the courts for discrimination until the decision of the Ontario Court of Appeal found that Ms. Bhadauria had a common law cause of action against Seneca College which failed to grant her an interview, allegedly because of her ethnic origin, for a number of job openings for which she was qualified.¹⁵⁵ This new cause of action was negated on appeal to the Supreme Court of Canada.¹⁵⁶ The Supreme Court's decision has amounted to the foreclosure of civil actions based directly upon a breach of the Code or any common law action based on an invocation of the public policy expressed in the Code.¹⁵⁷ The rationale for this decision was that the Ontario Human Rights Code provided a comprehensive administrative and adjudicative treatment of discrimination. This decision has attracted considerable criticism both at the time of its release and in the two decades since.¹⁵⁸

Creating a tort or torts of discrimination as an additional litigation discourse to commission process would provide a number of benefits. First, it would expand the scope of equality litigation into areas not covered by either human rights legislation or the Charter. Secondly, it would address the concern that access to justice is denied where commission agencies have the power to dismiss a claim without a hearing.¹⁵⁹ Thirdly, the development of human rights law would benefit from the greater legitimacy of civil actions. Finally, this development would provide a double-check on the Commission's functioning.¹⁶⁰ The availability of a civil action would also increase the options of claimants, some

¹⁵⁵*Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1979) 105 D.L.R. (3d) 707 (Ont. C.A.) per Wilson J.A. as she then was.

¹⁵⁶*Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193 (SCC).

¹⁵⁷at 203.

¹⁵⁸See, for example: I. McKenna, "A Common Law Action for Discrimination in Job Applications" (1982) 60 *Canadian Bar Rev.* 122; I. Hunter, "The Stillborn Tort of Discrimination" (1982) 14 *Ottawa L. Rev.* 219.

¹⁵⁹I. McKenna, "A Common Law Action for Discrimination in Job Applications," at 135.

¹⁶⁰I. Hunter, "The Stillborn Tort of Discrimination.

of whom may prefer a process wholly subject to their own control directed to the vindication of rightful claims.¹⁶¹

The potential disadvantages of encouraging civil causes of action for discrimination include the concern that it would detract from the mandate of human rights commissions and could eventually lead to their demise. Another concern is that the courts are not seen to have the requisite knowledge and understanding of human rights.¹⁶² This was part of the rationale behind establishing specialized agencies to begin with. Nevertheless it is important to recognize that many claimants do not in fact have access to an adjudicative process given the fact that only a few claims go forward to a human rights hearing. Concerns about commissions acting as a barrier to a hearing has resulted in recommendations that claimants have the option of direct access to a hearing with or without commission or other publicly-funded assistance.¹⁶³

In measuring the potential advantages and disadvantages of fostering civil causes of action for discrimination, some have argued that the focus should be on specialized human rights agencies so as not to divert resources.¹⁶⁴ However, the framework developed in this study suggests an opposite conclusion since a multiplicity of fora would contribute to a broader discourse on human rights. To be sure the argument is for parallel processes rather than exclusive ones. An important step would be to amend human rights statutes to provide that claimants can choose to have their claim heard in the courts, with safeguards against the duplication of actions.

¹⁶¹Lorraine Weinrib, "The Role of The Courts in the Resolution of Civil Disputes" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* 305-346, at 342.

¹⁶²Discussed in the *Cornish Report*, at 94.

¹⁶³See for example, the *Cornish Report*, *SHRC Report* and *CHRA Review*. There is already provision for this under the Quebec human rights regime.

¹⁶⁴the *Cornish Report*, at 95.

Support for a reopening of the development of a tort of discrimination foreclosed by the *Bhadauria* decision is increasing.¹⁶⁵ It is no longer clear that human rights legislation fully occupies the field of discrimination.¹⁶⁶ A number of discrimination-related civil actions have been permitted to proceed.¹⁶⁷ For example, a lower court has held that while there is no tort of sexual harassment in Canadian law, it was open to the party to proceed on the basis of a tort of "intentional infliction of mental distress occasioned as a result of the defendant's sexual and general harassment of the plaintiff."¹⁶⁸ These developments involve fostering innovation in the common law in light of Charter values. The *Jane Doe* case has taken an important step in this direction by weaving Charter analysis and negligence concepts together.

B. Aggregate Disputes and Class Actions

Another avenue to enhance the transformative potential of litigation is through greater procedural sophistication to encourage the aggregation of issues. Bringing a number of claims together helps

¹⁶⁵For support for the need to revisit the decision in this case, see Carol Aylward, *Canadian Critical Race Theory*, at 142.

¹⁶⁶The decision in *Bhadauria* was the result of the provisions of the Ontario Human Rights Code which gave the Commission exclusive jurisdiction and these provisions have been repealed. Thus, it is arguable that courts have the jurisdiction to entertain actions for independent torts based on allegations which are similar to ones that breach public policy under the Code.

In addition, it should be noted that pursuant to the *BC Civil Rights Protection Act* R.S.B.C. 1996, c.49, ss.1 and 2(1), any conduct or communication by a person that has as its purpose interference with the civil rights or another person by promoting hatred or contempt of a person or class of persons, or by promoting the superiority or inferiority of a person or class of persons on the basis of colour, race, religion, ethnic origin or place of origin, is a tort, actionable without proof of damage. Such an action must be commenced in the Supreme Court of BC and notice is required to be brought to the Attorney-General.

¹⁶⁷For example torts based on intentional infliction of emotional suffering (*Boothman v. Canada*, [1993] 3 F.C. 381 (T.D.) and breach of contract of employment (*Lehman v. Davis* (1993), 16 O.R. (3d) 338 (Gen.Div.) have been permitted to proceed. In *Lehman*, the Court determined that human rights proceedings could proceed simultaneously with civil actions (although in most cases the civil action is stayed until the claim under the Code has been disposed of so as to prevent a multiplicity of proceedings).

¹⁶⁸Russell J. in *Petrovics v. Canada* [1999] NBJ No.66. However, there are conflicting decisions on this point. For example, Hood J. reluctantly concluded that a civil cause of action for sexual harassment was foreclosed by *Bhadauria* while Sharpe J. ruled in *Sargeant v. Patterson* (1998) OJ No.82 that as a result of conflicting decisions it was not plain and obvious that an independent tort could not be established and permitted the action to proceed.

to reveal the structural and systemic dimensions of inequality strengthening the linkage between the individual and systemic levels of a social justice claim and paving the way for systemic remedies.

One vehicle for the aggregation of disputes is through the application of the law on public interest standing. Properly interpreted, public interest standing can increase access to the courts and avoid a multiplicity of individual proceedings. However, it appears the courts have been applying this in a strict manner with the unintended effect of not allowing a public interest litigant to bring claims on behalf of a larger group.¹⁶⁹ In two recent cases, the Supreme Court of Canada denied public interest standing on the basis that it was possible that the impugned legislation would be challenged by a directly affected person.¹⁷⁰ While the Court decided these cases on the grounds of efficiency, the effect has been the opposite. In the *Canadian Council of Churches* case this has meant that rather than a review of new refugee procedures decided in one case by the highest court in a timely manner, these issues are being litigated in the lower courts in a number of cases.¹⁷¹ A narrow approach to public interest standing atomizes equality claims by denying the structural connections between them and hence hinders the transformative potential inherent in the aggregation of disputes.

A second approach to the aggregation of disputes is the use of group or class actions in discrimination cases. Procedures of this type could be used in tort cases, Charter litigation and in human rights proceedings.¹⁷² Class proceedings are a way of grouping together a number of related law suits in order to ensure efficient use of judicial resources and to increase access where it would cost too much for plaintiffs to pursue their claims independently. At the present time, this legal avenue is available

¹⁶⁹Kent Roach, "Fundamental Reforms to Civil Litigation" in *Rethinking Civil Justice* 381-447, at 413.

¹⁷⁰*Canadian Council of Churches v. Canada* (1992) 88 DLR (4th) 193, *Hy and Zels Inc. v. Ontario* (1993) 107 D.L.R. (4th) 634. For criticisms of these cases see K.Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1995) at 5.230-5.260; June Ross, "Standing in Charter Declaratory Actions" (1995) 33 *Osgoode Hall L.J.* 151.

¹⁷¹This likely outcome was recognized by L'Heureux-Dube J. in her dissent where she states that public interest standing can in some cases contribute to efficiency by preventing a multiplicity of suits. *Hy and Zels*, at 652-3.

¹⁷²These issues are explored in Sharon Matthews, "Class Proceedings Action in Sex Discrimination Case - Exploring the Potential" (paper presented at national forum *Transforming Women's Futures* 1999).

in Quebec, Ontario and British Columbia.¹⁷³ In addition, the Supreme Court of Canada recently held in the absence of comprehensive legislation the courts must fill the void under their inherent power to settle the rules of practice and procedure with respect to a class action.¹⁷⁴ Despite the fact that this option has been available in Quebec since 1978, class proceedings are still a fairly novel way of litigating in Canada, although it is now a burgeoning field of activity.

There is a great deal of experience with class actions in the United States. The use of class actions for civil rights and other social policy reform litigation is seen as one of the important rationales for the development of the US Federal Court rules on these proceedings in the 1960s.¹⁷⁵ The class action attorney can be seen as a "private attorney general" working toward regulatory enforcement whether in civil rights or other areas.¹⁷⁶ While public interest organizations have played a role in developing class actions, few have sufficient resources to engage in systematic monitoring of corporate behaviour and extensive class action litigation. This has meant that in the US class actions have been more "entrepreneurial" than originally envisioned.¹⁷⁷

The majority of US class actions have been in other areas, such as consumer protection, torts, and securities. In 1996, 14% of reported class action decisions were in the field of civil rights.¹⁷⁸ The experience with race and gender discrimination cases has been hampered by strict judicial interpretations of what constitutes a class.¹⁷⁹ However, provisions of Title VII of the US Civil Rights

¹⁷³In addition, class action legislation has been prepared and/or introduced in several other provinces.

¹⁷⁴*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46 (File No. 27138).

¹⁷⁵Deborah Hensler, et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica: RAND Institute for Civil Justice, 2000) at 12. Although there are different views on the extent to which this was the primary rationale.

¹⁷⁶*Id.*, at 71-2.

¹⁷⁷*Ibid.*

¹⁷⁸Out of 1020 reported cases. *Id.* at 53.

¹⁷⁹The main hurdles in these cases have been: to show that the claims and injuries suffered by a person alleging discrimination is "typical" of the claims of the absent class members and judicial concerns over whether the

Act of 1994 authorize the Equal Employment Opportunity Commission to sue in its own name for individuals aggrieved by discriminatory practices without complying with the onerous requirements under Federal Court rules that have hindered these discrimination cases.

Moreover, these American difficulties need not be imported into Canada since for the most part Canadian legislation takes a different approach to class proceedings.¹⁸⁰ Here, the three objectives of class proceedings legislation are: (1) judicial economy or the efficient handling of potentially complex cases of mass wrongs; (2) improved access to the courts for those whose actions might not otherwise be asserted; and (3) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore their public obligations.¹⁸¹ These proceedings could assist in the implementation of transformative human rights practices in civil actions for discrimination and under the Charter.

The use of class proceedings to achieve social justice through tort law will depend upon the development of torts of discrimination as discussed in the previous section. However, their implementation in Charter litigation is less straightforward. While it is easy to see the advantages of class proceedings in Charter litigation, judicial acceptance of this approach is uncertain.

A number of examples highlight the utility of class actions in Charter litigation. First, founding an argument that a provision has a disproportionate adverse impact on women would be simplified where the claimant was comprised of a class of individuals, rather than a single litigant. In the *Symes* case discussed above the outcome could have been very different had the claimant been a representative class of women, including single mothers, lower income earners and so on.

representative plaintiff adequately represent the class members. This approach flows from the US Supreme Court decision in a race discrimination case, *General Telephone Co. v. Falcon* 457 US 147 (1982).

¹⁸⁰Matthews, "Class Proceedings Actions".

¹⁸¹*Ibid.*

Secondly, class actions could also be used by equality-seeking groups to force reluctant governments to implement existing precedents in different settings. For example, hearing-impaired individuals in provinces outside of BC could use this litigation mechanism to achieve access to interpretation services in the medical context where their provincial government has not complied with the ruling in *Eldridge*. This would broaden the impact of a test-case across Canada. This type of case might also give rise to damage awards under s.24(1) of the Charter, where a government ignored a clearly stated constitutional duty.

The use of class actions in Charter litigation was thrown into doubt in *Guimond*.¹⁸² In this case, the issue was a Charter challenge to the constitutionality of provincial legislation which imprisoned persons who did not pay certain fines. The Supreme Court of Canada decided this case on the issue of whether there was sufficient basis for the claim rather than on whether a class action was the best way to proceed. However, in the reasons the Court stated that because it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity it is generally undesirable to do so. However, the Court left open the issue of whether courts have a residual discretion to deny authorization of a class where the criteria are met.¹⁸³ This case has led to contradictory interpretations in the lower courts.¹⁸⁴

¹⁸²*Guimond v. Quebec (Attorney General)* [1996], 3 S.C.R. 347.

¹⁸³It should be noted that this case dealt with Quebec class action provisions which are substantially different from the provisions in other provinces.

¹⁸⁴In *Buffett v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 53, the plaintiff sought to certify an action for a declaration that Ontario legislation discriminated based on spousal status and for a declaration that all class members would be entitled to payments under the legislation. Crane J. held that a class action was not the preferable procedure for an application pursuant to s.52 of the *Constitution Act* because a successful application under s.52 renders the provision "of no force and effect" and would apply to everyone and would therefore confer on all class members the ability to apply for the benefit. The argument that without the class action it would not be economical for one person to bring the s.52 application was not accepted by the Court.

In another case, while holding that class proceedings are not the preferable procedure, a BC Supreme Court rejected the submission that an action for a declaration that a governmental policy violated s.15 of the Charter and for damages pursuant to s.24(1) cannot constitute a case of action within the meaning of the BC class proceedings provisions and specifically ruled that a declaration can constitute a cause of action. *Auton v. BC (Minister of Health)*. See discussion of another aspect of this case in Chapter 7.

Many human rights statutes also provide for group proceedings. For example, the British Columbia *Human Rights Code* provides that complaints may be filed on behalf of class of persons but the Commissioner may refuse to accept it on behalf of a class of persons if the Commissioner is satisfied that proceeding with a complaint is not in the interests of the class.¹⁸⁵ However, there has been limited experience with group proceedings to date mainly due to the novelty of these procedures.¹⁸⁶

Class proceedings could be pursued in civil actions, Charter litigation and in the human rights complaints process. These avenues can contribute to social justice because they are more inclusive processes that help to foster the connections between individual complaints and can lead to a greater understanding of the impact of structural inequality. Achieve this transformative potential will require greater public discussion on the public purposes of class action proceedings that would contribute to a better understanding on the part of the judiciary, the legal profession and other members of society.¹⁸⁷

The emphasis placed in this section on fostering multiple litigation discourses may lead to concerns about the negative consequences of contradictory interpretations. For example, in the United Nations context the overlapping jurisdictions of the various bodies that oversee the application of international human rights norms has led to what some view as problematic sea of different approaches to these

¹⁸⁵The Code does not set out factors to be considered in this regard.

¹⁸⁶Although, problems have already been faced in the limited applications to date. In *Canada Safeway v. Saskatchewan (Human Rights Commission)*, (1997) SJ No. 502) the Court of Appeal reversed the order to proceed as a class. In that case, the complainant alleged that all female cashiers of Canada Safeway has been discriminated against on the basis of sex in terms of rates of pay and opportunities for full time employment. The Court of Appeal relied on US authority in finding that the complainant would not adequately represent the interests of the class because she was essentially acting at the instigation of the Union, which could potentially be found liable for the complaints, having negotiated the impugned contractual provisions with the employer. One of the problems was the complainant was likely to have been in conflict with the class members on a common issue.

¹⁸⁷Hensler, at 499-500. Three of the general recommendations that have been made in the US context about the future of class actions are the need to educate judges, to open these proceedings to public view and to achieve a better balance between private interests and public purposes. I have adapted these ideas into my recommendation.

norms.¹⁸⁸ However, a lack of homogeneity can also be seen as a positive force toward transformation rather than an obstacle to it.¹⁸⁹ The dynamic relationship between public and private law concepts is a healthy one that is fostered by multiple litigation discourses.

From a transformative perspective, contradictory interpretations can play an important role in the dialectic relationship between facts and norms that gives rise to law as a learning process. Within a dialectic, contradictions lead to reformulations and synthesis which can be transformative. As an example, a novel development in understanding equality in the tort context could lead to a more reflective scrutiny of existing equality analysis in the Charter context. The relationship between the various litigation discourses is best seen as a dialectic one in which the synthesis provides a further opportunity for the interposition of human rights norms.

This chapter has reviewed a number of ways in which the transformative ideal could be implemented in the context of the courts. The focus has been on developing more participatory and deliberative practices both in developing public and inclusive court procedures and judicial approaches, and in their implementation in specific cases.

¹⁸⁸Eric Tistoune, "The Problem of Overlapping Among Different Treaty Bodies" in *The Future of UN Human Rights Treaty Monitoring* 383-402.

¹⁸⁹For example, this argument is made by Carol Aylward who argues that feminists should not focus on developing a uniform approach to equality analysis because there are benefits to multiple approaches.

CHAPTER 7

TOWARDS TRANSFORMATIVE HUMAN RIGHTS PRACTICES

7.1 Overview

The transformative ideal provides a critical lens through which to consider the problem created by the paradox of the growing and evolving demand for the protection and promotion of human rights and the vocally expressed discontent with the legal institutions charged with these responsibilities. In the first two chapters of this study, this initial problem was recast in different terms. The conclusion was drawn that the narrow focus on whether the courts and human rights commissions should be enforcing human rights in their current fashion was insufficient and was in itself problematic. It was argued that the investigation must shift from indicative questions based on current conceptions of the function of legal institutions and their present day operations, to subjunctive ones.

This shift ushers in a new starting point for discussion, one based on questions of what is imagined, or wished, or possible. This is a discussion premised on open-ended questions beginning with "could." The transformative framework insists that these questions be formulated on normative grounds inextricably connected to the achievement of social justice. Two specific questions are formulated along these lines: what could be the role of Canadian legal institutions in achieving social justice? how could these institutions be structured so as to carry out this role more effectively? The subjunctive framing of the questions is important because it unleashes the "transformative power of what could be".

This study has posited that the legal institutional role should be conceived as a contribution to a broad and evolving discourse on human rights and responsibilities within the public sphere. In addition, it is asserted that this role should be enhanced through the development and implementation of transformative human rights practices. Together these two elements establish a transformative ideal as a new frame of reference for understanding the potential role of legal institutions in achieving social justice. In Chapters 3 and 4, normative ideals of the public sphere, discourse principles, and the philosophy and practice of transformative public conflict resolution were introduced and examined in order to enrich this conceptualization of the transformative ideal.

Despite a philosophical commitment to praxis, the weakness in the critical method is often one of difficulties in moving from theory to action. This study has actively tried to overcome the theory/practice divide by connecting conceptual discussions with practical reconstruction. Many openings for change and many threads of reform have been identified in this study. These transformative possibilities were woven together in Chapters 5 and 6 to provide some specific suggestions for steps that can be taken toward implementing transformative human rights practices in the human rights commissions and the courts.

This concluding chapter brings together the main themes developed throughout the study in order to consolidate these ideas and foster movement toward the implementation of transformative human rights practices. Two approaches are taken toward this end.

The first section brings together the various components of the transformative ideal discussed throughout the study. The original provisional definition of transformative human rights practices is reviewed and elaborated. A second part explores the dynamics of change and resistance. These two parts integrate the points made in earlier chapters with respect to social transformation, the dynamics of human rights, discourse and the public sphere. A third part lays a foundation for a discussion on the evaluation of transformative human rights practices.

The second section revisits the theme of the relationship between legal and political institutions as mediated by the public sphere. The focus here is on the need to cultivate a human rights ethos within government and civil society. The idea of a transformative remedial discourse is introduced as an example of how this ethos could be enhanced.

A brief conclusion reflects on the relationship between human rights practices and social justice and emphasizes the degree of change required in this social transformation process.

7.2 The Transformative Ideal

A. Transformative Human Rights Practices

At the outset, transformative human rights practices were provisionally defined as practices that consciously make social justice rather than dispute resolution their primary aim. A more comprehensive elaboration of this concept can now be undertaken based on a greater appreciation of the dynamic relationships between human rights, deliberation, conflict resolution and social transformation operating within the public sphere.

At present our image of human rights practices centers around a traditional legal model of enforcement. The focus in the current model is on adversarial litigation processes leading to an authoritative statement interpreting and applying a given human rights norm in an individual dispute. This process extends only as far as defining and enforcing a specific remedy. Where a specific human rights norm has been sufficiently defined through legal institutions, it can serve as a background norm that regulates interactions and is applied through informal practices, such as negotiation and mediation. Under this traditional approach, human rights practices emphasize the development of legal doctrine which serves as a precedent and the retrospective application of a remedy in an individual case.

However, the term human rights encompasses a dual meaning as a body of doctrine and a set of social practices. Litigation is only one category of this social practice. Human rights practices extend to other deliberative settings and forms of social action in which rights norms play a role. Other types of human rights social practices include, for example, educational initiatives, advocacy within policy-making fora, negotiations and mediations in both legal and community settings. All of these social practices operate to further the interpretation and application of rights norms in concrete, relational settings. While many theorists focus on the word or doctrine of the law as a concrete result, it too is more aptly thought of as an ongoing discourse or discursive practice. Human rights norms reflect a powerful and important human consensus about how society should operate. However, these statements are perpetually incomplete: rights are an open-ended project.

This ongoing rights discourse is best characterized as involving the concretization of norms in specific circumstances through the development of provisional and situational shared meanings. It is not a question of divining through legal battle the one true single meaning of a norm, one that settles the matter once and for all. Human rights practices do not end at the door of the courthouse, commission or tribunal. They extend to a broader range of deliberative and social practices through which individuals and institutions consider, refine, adapt and apply human rights norms.

The concept of transformative human rights practices is based on this broader view of the dynamics of rights norms. It encompasses but is not limited to legal models. It extends to many methods of deliberation and accommodation. Transformative human rights practices offer the potential to create equality and social justice through a multitude of interactions. It is in this sense that I use the phrase creating and re-creating equality on a daily basis.

Structural inequalities operate through existing social norms and structures that privilege some people and disadvantage others. These tightly knit norms and structures result in patterns of behaviour, stereotypical attitudes, ideas and values, institutional policies and procedures and laws that perpetuate these privileges and disadvantages. They recreate inequality in a multitude of ways on an ongoing and daily basis unless something intervenes. Transformative human rights practices

interrupt the operation of patterns that reinforce inequality by giving rise to new behaviours, attitudes, ideas, values, practices, policies and laws that conform with equality rights norms. The focus of these practices goes beyond remedying inequality and extends to creating equality.

Aside from being a more inclusive definition of human rights practices, the transformative conception is also a normative one. It incorporates a number of values and qualities. Transformative human rights practices are deliberative, participatory, public and prospective. They are processes of reason which incorporate the principle of equality in a fundamental way and actively resist the operation of power and privilege. These practices are focused on resolution rather than settlement and integrate process and outcome in a more fundamental way than do most current practices. Together these qualities give human rights practices their transformative potential.

Transformative human rights practices require a shift away from adversarial practices and toward communicative, collaborative, reflective and reflexive practices that foster deliberation. Deliberation is a process of reasoned discussion aimed at achieving mutual understanding and rationally motivated consensus. It is fundamentally a process of reason that is initiated by a recognition and acknowledgement of the other party. It is inclusive and involves both the recognition of difference and also the mutual interest in reaching understanding. Deliberative principles stipulate that people enter discussion to solve collective problems with the aim of reaching agreement. Reasonableness entails having an open mind.

Deliberation is also a reflexive and reflective form of interaction. It is reflexive in the sense that it involves a dynamic process that is characterized by people calibrating their actions with others. Reflection is central to learning from experiences: people and institutions must critically reflect on the assumptions, values, and beliefs that shape their understanding. Reflexive and reflective deliberative practices open up new lines of thinking, new ways of interpreting the context, and facilitate the search for other potential models of action.

Within human rights practices, deliberation involves conflict over meanings and is therefore contentious. However, these are expressions of disagreement made in an interactive relational context. Deliberative practices can be contrasted with processes of power where the emphasis is on adversarial negation of the other and on ignoring or discounting common ground. Deliberation highlights processes of influence rather than power; reasoning and listening, rather than competitive bargaining.

In terms of litigation, transformative human rights practices require a more deliberative approach within the processes leading to judicial decision-making. While judging is a process of reason, earlier phases of the litigation process tend to be highly adversarial and are not conducive to deliberation. In addition, any imbalances of power between the parties can heavily prejudice this process. The transformative approach requires consciously challenging the operation of power in all of these stages and manifestations. This is equally true with respect to concerns about adversarialism and imbalances of power within current informal resolution processes in the human rights context.

Characterizing human rights practices as deliberation does not mean that rights are only about rights talk. Human rights practices are a form of social practice that involves both discursive and non-discursive practices, that is speech and action.¹ It is not just the production of the discourse elements themselves but how they are shared that constitutes the practice. For example, in a mediation, social action is always taking place rather than just being talked about. In a mediation of a sexual harassment complaint involving a man and a woman, it is the site where gender relations and entitlements are produced, where dominance can either be reproduced or altered.

The emphasis on participation within transformative human rights practices is both functional and normative. It is functional in the sense that both the process and outcome are improved by the inclusion and direct participation of all of those affected by the human rights norm in those particular

¹Fairclough, *Discourse and Social Change*, at 73. While some social practices are wholly constituted by discursive practice others are not.

circumstances. The experiential knowledge of those involved contributes to a more effective resolution.² Participatory processes are more likely to contribute to social transformation because they facilitate the parties' own learning process, in comparison with the more limited change possible through imposition of an outcome.

Aside from its functional value, participation in human rights practices has an independent normative value of furthering the self-development and self-determination of the people involved. It can be empowering for marginalized groups. This involves a shift from seeing people as the passive recipients of rights to active participants in a process of actualizing rights.³ Participation by both the individual and the community in the social construction of policies affecting their well-being is an aspect of equality, some argue the most important aspect.⁴ In addition, increasing the "active procedural status"⁵ of individuals enhances their capacity to participate within the public sphere more generally and contributes to the development of critical public opinion.

Transformative human rights practices operate on the basis of the metaphor of mutual education rather than the exchange metaphor that underlies most negotiation and bargaining processes. Human rights norms intervene in this education process to change the direction of learning. Intervention is required because there is a tendency to process only information that reinforces what we already believe about ourselves and society. This redirection takes place by learning about alternative perspectives on substantive equality norms and the ways in which social and structural inequalities are experienced by others. The participatory aspect of transformative human rights practices

²Sheppard, "Caring in Human Relations", at 343.

³Harvey, "Governing After the Rights Revolution", at 85.

⁴A. Ely Yamin, "Reflections on Defining, Understanding and Measuring Poverty in Terms of Violations of Economic and Social Rights Under International Law" (1997) IV *Georgetown Journal on Fighting Poverty* 273, at 287-8.

⁵Habermas, *Between Facts and Norms*, at 410-11.

suggests the need for direct participation by the parties, in addition to any legal representation. In the litigation context, this principle suggests the need for participatory litigation strategies.⁶

It is axiomatic to define transformative human rights practices as inherently public. These practices work toward the implementation of the societal consensus on the importance of ensuring human dignity in all of its manifestations. Regardless of the specific nature of the conflict between the parties, the public interest is an intrinsic part of the equation. In all situations, it is a question not just of advancing an individual's equality rights but advancing society's goal of equality.

In practical terms, recognizing the public nature of human rights practices requires a greater emphasis on specific means to have the public interest actively represented within all processes. In the litigation context, whether in the courts or tribunals, this involves issues such as the role of public interest intervenors, the role of the Attorney-General or commission, and greater opportunities for group-based processes. In other conflict resolution processes, the public interest is tied to the role of the mediator/facilitator and issues such as the review or approval of mediated outcomes.

It will rarely be sufficient to think in terms of one "public". Depending on the nature of the human rights issue or conflict, it may be necessary to think in terms of a number of "publics." One approach is to conceive the public interest in three levels: the "general public" (people who not yet have a specific, identified stake in the decisions); "organized public" (members of groups who have the interest and knowledge and time to devote to active participation); and, "local public" (individuals or groups who might be directly and significantly impacted by a proposed action and take an intense

⁶Participatory litigation strategies are ones in individuals and/or groups who are affected by the issue or conflict and therefore have experiential knowledge work with legal professionals to develop all aspects of the legal argument and strategy. Avvy Go and John Fisher, "Working Together Across Our Differences: A Discussion Paper on Coalition-building, Participatory Litigation and Strategic Litigation" (Winnipeg: Court Challenges Program of Canada, 1998).

interest in the decision making process).⁷ Mechanisms for participation should take into account the different capacities and needs of these various publics.⁸

Transformative human rights practices encompass the retrospective approach but place a higher priority on dealing with these issues prospectively, by fostering learning and ongoing change. The prospective impact is heightened by paying close attention to process as well as outcome, in particular with respect to fostering equitable relations between the parties. Practices that transform the nature of the relationship between the participants provide them with the context necessary to address future human rights issues. The resolution of each conflict can thus be seen as an investment in the future. Even where a relationship has already been severed, for example when an employment relationship has ended, learning remains an important component of the process. The resolution of this type of dispute can assist in the future regulation of similar relationships with others and lead to more general changes in policies, procedures or institutions.

Another concrete example of the prospective potential relates to the ways that human rights norms developed in one context can have an effect in other situations. This capacity exists under the traditional legal model since legal remedies can serve as precedent. However, at present there is insufficient institutional support to promote this prospective or preventive impact. Transformative human rights practices put a greater emphasis on this proactive effect by emphasizing structural change and education as well as through improved communication about, and reinforcement of, judicial and quasi-judicial human rights decisions. Proactive approaches include the conscious promotion of human rights practices in other sites through systemic remedies and presenting reasons in a format that promotes learning processes.

Transformative human rights practices integrate process and outcome in a more elemental way by comparison to current practices. This point relates back to their deliberative, participatory,

⁷Dukes, *Resolving Public Conflict*, at 66. This is one of many different ways to conceive of the multiplicity of public interests.

⁸*Ibid.*

prospective and public nature. The process of achieving an understanding of rights is as important as the outcome of these practices: if a human rights practice is going to help create equality it must integrate equality norms within the practice itself.

In addition, transformative human rights practices are less instrumental than current conceptions. They involve a shift in the point of view from which we handle "problems". This is a move from a narrow goal-oriented perspective to one in which we examine how we can regulate our common aspects of life in the equal interest of all the parties and the public interest in social justice. Rather than focusing on specific results, this approach involves a process of redefining sources of conflict and potential remedies in light of human rights norms. Resolving incompatible normative interpretations leads in some way, to change: in attitude, perception, belief, norms, behaviour, roles, relationship, and so forth. Human rights conflict is a rich opportunity for growth, to be fully exploited, not as a problem to get rid of as quickly as possible.

Finally, transformative human rights practices aspire to resolve rather than merely settle contradictory claims over the meaning and application of rights norms. The current legal model aims at achieving a settlement, whether through an authoritative statement by a court or tribunal or through an facilitated negotiation process. The higher objective relates to the shift from addressing human rights issues from a conflict resolution perspective rather than a dispute resolution one. While dispute resolution processes are premised on maintaining the status quo, conflict resolution is premised on the need for change toward greater social justice.

Transformation involves a redefinition of the parties' underlying interests in light of human rights norms. Transformative human rights practices can therefore be viewed as addressing the contest over different notions of entitlement rather than as a process that sets out to meet people's needs or interests. This further underscores the potential for transformation.

The basic premise of the transformative approach is that human rights norms have a role in ordering society and in shaping it toward social justice. Legal institutions have the potential to contribute

to a broad discourse on human rights in a number of ways. They have a primary role in maintaining the normative conditions of public discourse by protecting and promoting human rights and they take in ideas developed in the public sphere and make authoritative statements about rights norms. Both of these functions are enhanced through transformative human rights practices.

Authoritative statements about rights norms contribute to the development of an intersubjective consensus about how these norms should be applied in specific circumstances through discourse in the public sphere. However, legal institutions do not monopolize the interpretation of human rights since other state institutions and members of civil society maintain an independent role in this process which is also played out within the public sphere.

Human rights encompass both a statement of an alternate desired reality of social justice and a means to achieve this altered state. Transformative human rights practices are ones that assimilate this aspirational character. Glimpses of this transformative promise can be found in some existing human rights practices and this potential needs to be reflected upon and consciously cultivated. The implementation of transformative human rights practices requires an greater appreciation of the dynamics involved in moving from the existing to ideal human rights practices, taking into consideration processes of resistance.

B. The Dynamics of Resistance and Change

The key principles encompassed in these normative definitions also guide the reform process aimed at developing and institutionalizing transformative human rights practices. Moving from the ideal to the actual requires the transformation of interests and preferences through public, critical, reflective participation in deliberative practices. In addition, a number of key themes and the dynamics of social transformation and resistance identified in this study could help to shape this reform process.

Three general themes should guide the reform process. These are: the essential openness of institutions and procedures; a fundamental shift in thinking from combating discrimination to promoting equality; and the intrinsic relationship between individual and systemic approaches.

The first theme is the essential openness of procedural and institutional arrangements. Institutions, procedures and practices can be designed in an infinite variety, as long as changes are supported by sufficient social consensus and consistent cultural practices. Canadian society can decide what conflict resolution processes it wishes to employ with respect to human rights conflict and then design the most appropriate standards, procedures and institutions for the job. The potential capacity of any existing or novel institution is open-ended.

Secondly, equality norms must have a primary role in providing a structure to these practices and discourses. One of the major challenges posed in implementing transformative human rights practices is the fundamental inconsistency between the requirement of equality and the reality of structural inequality. Methods must be developed within deliberative practices to directly address this apparent contradiction.

Structural inequality can be addressed by dealing directly with difference and particularity within transformative human rights practices. This involves taking proactive steps to draw all social groups into the dialogue and safeguard full and diverse participation in the strongest terms. This has to happen on both a macro and a micro level: by consciously building equality into the structures of discourse within the public sphere and within specific sites for the interpretation and application of human rights norms. Inclusion and equality must be written into the structure of all deliberative practices.

But ensuring participation is not enough, we must make certain that this participation is on terms of equality. This involves going beyond formal inclusion and extends to ensuring that informal practices recognize and value differences and do not exclude. Participation without reference to

equality norms is meaningless and potentially harmful.⁹ The need to place priority on equal participation is inherent in notions of democracy since it is clear that inequality seriously distorts the process of dialogue.¹⁰

This enlarged conception of equality has been recognized to some extent in the legal doctrines of substantive equality and adverse effects and systemic discrimination. However, as discussed in the first chapter, the recognition of broad dimensions of inequalities is uneven. Many legal approaches perpetuate the initial focus on individual acts of discrimination. This unevenness suggests the need to rethink the focus on discrimination in a more fundamental way.

The right to equality requires the state to contribute to the creation of conditions for its full realization. This involves both anti-discrimination measures and positive and productive support for equality. It involves incorporating an equality perspective in all policies at all levels and at all stages, by the actors normally involved in policy-making.¹¹ This shift from a narrow anti-discrimination focus to the substantive goals of equality is the first step: institutional and procedural changes flow from it. Full realization necessitates prospective measures rather than simply retroactive remedies.

The third factor involved in the movement toward integrating transformative human rights practices is a recognition of the intrinsic relationship between individual and systemic approaches. This necessitates a rethinking of the relationship between these levels of action and change. An infringement of the right to equality is treated by the legal system as a discrete injustice, but social inequality is more than an accumulation of discrete injustices. Inequality results in discrimination,

⁹Lucie Lamarche, "Le droit des femmes de participer a la determination des politiques publiques: de la rhetorique a la pratique des attributs de la citoyennete" (paper presented at the national forum *Transforming Women's Future*, 1999).

¹⁰Young, *Inclusion and Democracy*, at 24.

¹¹This is the idea of "mainstreaming" rights. See for example, Council of Europe, Rapporteur Group on Equality Between Men and Women, *Gender Mainstreaming*, GR-EG (98) 2, 26 March 1998, at 6.

disentitlements and disadvantage which are systemic but at the same time have very personal consequences. Transformative human rights practices need to address the personal consequences in a way that addresses structures of inequality. For example in a sexual harassment complaint, this requires addressing broader workplace dynamics on the conflict as solely a bilateral issue between the parties. This approach is required both for understanding what has occurred and for formulating appropriate responses.

Close attention has to be paid to devising a balance between structure and agency in our analyses. Translating rights guarantees into effective rights requires rendering personhood and sense of agency more visible. At the same time, this work must take place in the context of developing a greater understanding of the structural inequalities and the systemic nature of rights violations. There are transformative possibilities in redesigning this relationship that need to be fostered.

The dynamics of social transformation developed in this study can also be applied to the process of developing and implementing transformative human rights practices and a broader human rights discourse. The dynamics relate to see the dialectic of law as a social learning process, levels of change within processes of transformation, the nature of human rights norms and the relationship between resistance and change. These dynamics interact in a number of ways.

Transformative human rights integrate a dynamic view of human rights norms. These norms are both the subject of discourse and at the same time, they frame deliberative and social practices and the structure of discourse. This view replaces the current focus on the dichotomy between direct and indirect application of human rights norms. It sheds a new light on our approach to "enforcement" of rights and enhances the significance of the cooperative and educational approaches to applying human rights norms. It also assists in the shift away from narrowly focusing on the roles and responsibilities of state and state actors in the implementation of rights.

Rather than a narrow focus on justiciability and the role of the courts, this view sees the implementation of human rights as a shared responsibility. Transformative practices will contribute

to a public ethos of human rights and a broad sense of shared responsibility for the interpretation and application of rights norms. The end result is the translation of normative commitments into shared, reflectively-held human rights norms that permeate all institutions and relationships. It is in this way that human rights norms and transformative practices contribute to meaningful change and social justice. This contribution occurs through a social learning process fostered by the contradictions between facts and legal norms. Transformative human rights practices engage this dynamic directly by acting as a synthesizer bringing the facts and norms together. They are as a creative force explicitly geared toward social learning and greater social justice.

This dialectical process is further encouraged through a broader discourse on human rights norms within the public sphere. Enhanced discourse fosters more opportunities to synthesize the contradictions between human rights norms and the factual experience of members of society. Transformative human rights practices reinforce this discourse and help it to become more extensive, inclusive, comprehensive, explicit, and open-minded. Fostering multiple sites and exploiting the relations between different sites and the differences between the discourses therein contributes to the social learning process. This is because the reconciliation between the discourses is a dialectical process rather than a hegemonic one. An authoritative statement of the meaning of a human rights norm by a legal or political institution is not the last word, it is a temporary synthesis that serves as a base for further deliberation and progress.

These dynamics need to be conceived as operating at a number of levels. Transformative human rights practices contribute to change at the level of individual and group attitudes, perceptions and behaviours; institutions; ideology; and structure. Practices mediate between these levels of activity. They do so by directly addressing change at levels and the connections between them. For example, transformative human rights practices should look to ways to build in loops for learning and institutional/structural change. Again, sexual harassment claims provide an example where both the process and remedy can contribute to learning and institutional change. Changes occur mostly by a shifting in relationships among institutional arrangements and cultural practices that comprise one

or more social settings. Social transformation requires learning at both the individual and institutional levels.

The focus on the potential of transformative human rights practices ushers in a new starting point for discussion, one based on questions of what is imagined, or wished or possible. This is a discussion premised on open-ended questions beginning with "could." In the Canadian context, this discussion does not take place on a *tabula rasa*. It must take into account the status quo of institutional arrangements and practices. This involves anticipating the critique of the ideal of transformative human rights practices and the nature of resistance to these types of changes.

The difficulties faced in implementing transformative practices are the same ones that occur with placing human rights on the political and societal agenda to begin with. Human rights are marginalized "because unlike civil liberties, which rearranged no social relationships and only protects our political ones, human rights is a direct assault on the status quo".¹²

More specifically, the existing terrain of public debate about the role of legal institutions is narrowly focused on the legitimacy of the courts in shaping the legislative power of governments. This was highlighted in the discussion on the legitimacy of judicial review. This discussion showed how the proposals for judicial restraint are often masks for more fundamental denials of the role of rights norms within democracy. In the current Canadian context, charges of activism are a form of backlash against progressive advancements in the interpretation and application of rights. The human rights agenda is also limited by the priority on an ethic of managerialism, that is the focus on less expensive, faster settlements with only indirect attention paid to the quality of processes and outcomes.

These limited approaches to viewing the problematique of legal institutional roles and functions have been challenged in this study and should be directly addressed in reform efforts. These forms of

¹²R. Abella, "Diversity in Rights Theory: Untangling the Difference between Civil and Human Rights" (1997) 2 *National Journal of Constitutional Law* 255, at 259.

resistance and backlash underscore the importance of developing and promoting a more nuanced theory of judicial review. They also argue for weaving in countervailing substantive or qualitative concerns into this problematique to a greater extent than at present.

Another barrier is the tendency to focus on the existing institutions and practices as the only possible reality. This is another dimension of the power of the status quo. One of the great sources of difficulties in achieving social change is the interdependence of practices. This is a primary source of durability, even when the inefficiencies of social arrangements are well-understood.¹³ Practices may be maintained in the face of seemingly contradictory experience because "competing explanations for events are not readily available and members reinforce one another's beliefs."¹⁴ The continuing hold of adversarialism is an example of interdependent practices that blocks reform toward transformative alternatives. Despite widespread critique of the adversarial legal model, there is no real impetus toward fundamental reform. The integration of "alternative" models has been extremely limited and has not confronted the underlying premises of the applicability of the competitive dispute resolution model to public conflicts. The undue reification of current practices needs to be confronted through the reassertion proposition of institutional flexibility. Institutions are inherently malleable and hence could facilitate transformative human rights practices to a much greater extent than at present.

Another barrier is the cyclical nature of social change that results in hard-won "victories" for social justice becoming quickly devalued. One of the clearest examples of this in reform of sexual assault law where hard-won advances through legislative reform have been overturned by the courts and by unreformed criminal law practices. Transformative human rights practices are aimed at intervening in this cycle because they aim at transforming the underlying relations and social structures that shape the definition of interests.

¹³Elisabeth Clemens, "To Move Mountains: Collective Action and the Possibility of Institutional Change" in *From Contention to Democracy*, at 114.

¹⁴*Id.*, at 117-8.

Transformation aspires to more fundamental change that affects both formal institutions and social institutions, in the sense of day to day interactions. Rather than simply incorporating reform claims within existing practices, the practices themselves must be substantially altered. The integration of "ADR" has not transformed the legal model because it has not challenged the underlying premises of existing procedures and practices. Transformative practices aim to do just that.

Strategies to overcome these forms of resistance can be developed based on a critical approach to social transformation. Rather than working from premises based on the status quo, the starting point is the ideal situation. For example, this could involve asking ourselves what it would be like if we had a public reasoned conversation about a given human rights issue, such as gender-based norms in a workplace. The first step of moving from the ideal to the actual is to consider what prevents us from having this reasoned conversation. It could be lack of alternatives, structural inequalities, lack of deliberative practices, institutional weakness or a combination of these and other factors. The next questions becomes: what steps can we start to take to get to this desired situation? Answers lie in finding connections between the ideal and actuality through the glimpses of transformative potential in current practices, even if these glimpses are fleeting. Even in the midst of high conflict, there are opportunities for cooperation.¹⁵

A number of specific strategies to bridge the gap between transformative and current human rights practices can be developed based on the dynamics outlined in this study. One of the keys to unlocking these interdependent social practices is the positing of alternatives. Much of this study has been devoted to contributing to the disruption of existing human rights practices by exploring the potential of alternative, transformative possibilities.

Another related strategy is to focus on the various levels in which society operates and alternatives for and the potential for change in each of these. But the predominant model cannot be replaced simply through the positing of an alternative process. As the "ADR" movement has shown even

¹⁵One of the groundbreaking studies on this topic is R. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

conscious attempts to change legal culture and the attitudes and behaviours of practitioners through education are insufficient. Structural change is also required by realigning incentives and re-engineering the basic rules of play at work in a given legal context.¹⁶ For example, increasing participation in the litigation process could involve: reform of doctrines with respect to standing and intervention (analytical level); changing the views and practices of lawyers and judges to the participation of individuals without legal training (level of attitudes, perceptions and behaviours); amending rules, policies and procedures with respect to participation; (institutional) and creating or funding organizations in order to support these forms of participation (structural).

All change processes encompass three critical psychological components: motivation, resistance and commitment to change. Directions for reform to implement transformative human rights practices must deliberately build mobilization of energy toward changing the status quo and commitment to change. Deliberate steps are required to establish actions or processes that support the new level of behaviour and lead to resilience against those resistant forces, patterns and behaviour. This results in the restabilization of a system to its new or changed level of behaviour in order to keep it from returning to old patterns.

Resistance plays a constructive role in the change process. It is a naturally emerging part of the change process, or any movement away from the status quo. Mobilization of forces against change is a necessary prerequisite of successful change. Strategies for implementing transformative human rights practices need to include constructive response to resistance.

A number of positive strategies have been developed based on experimental research and analysis of change processes.¹⁷ One strategy is "fractionating the conflict," that is pushing for a smaller change or amount of deviation from the status quo or breaking a larger conflict down into manageable pieces and working on resolving the smaller pieces first. A related point is the need to

¹⁶Mnookin, Peppet, Tulumello, *Beyond Winning*, at 320.

¹⁷R.Fisher, "Fractionating Conflict" in R.Fisher (ed) *International Conflict and Behavioral Science* (New York: Basic Books, 1964).

maintain a balance between stability and change. These findings suggest the need for incremental change toward transformative human rights practices within a comprehensive principled framework and long-term strategy.

An important aspect of change strategies is the need to attend to the psychological processes of change in addition to political and legal ones. Recognizing the effects of change on parties helps to weaken forces of resistance and facilitates the participation in a cooperative resolution process. There is a need to foster future-oriented thinking and get away from a "change is bad" mentality. These approaches will be important in promoting new conceptions of fairness and justice within the legal and judicial community threatened by reform of the legal model. For example, attempts to recognize the values of the criminal bar and to engage them in future-oriented reform could assist in implementing criminal law reforms with respect to sexual assault law. The goal is gaining commitment, not simply compliance.

These lessons can be used on the macro scale in terms of reform of legal institutions and at a micro level by the conflict resolver involved in specific situations. In all cases, the role of the change agent or facilitator is to generate motivation, identify and handle resistance, and foster commitment. The goal is not to prevent resistance from developing but rather to recognize and handle it productively. Some specific strategies have also identified in this regard.¹⁸ The facilitator can emphasize how she herself is changing rather than focusing on how the other, or the system needs to change. Steps can be taken to overcome the tendency to devote too much attention and resources to those most resistant to change by focusing on working with those who are least resistant. Attention and resources can be placed on those whose motivation for change is already high. This plays a valuable role in helping to spread the positive energy for change rather than weaken the negative energy against change.

¹⁸Marcus, "Change Processes and Conflict", 378-80.

The public sphere has an important role to play in the dynamics of change and resistance that will shape the implementation of transformative human rights practices. The private interests of individuals who, and institutions which, are invested in the current rights system can be transformed in the public sphere into shared general interests through discourse. A critical public debate which recognizes equality norms and is fully inclusive of diverse perspectives opens up the possibility for significant change in outcomes. An active public engagement in deliberations of how legal institutions could and should work is a fundamental requirement for transformation.

The virtually unlimited potential of contextualized human activity operating within institutional relationships and relational networks is underscored in this study. At the same time, the possibility of human action is understood to be limited by current structural inequalities and patterns of privilege. It is easy to become lost in a chicken and egg debate about whether the focus should be on fostering conditions of discourse conducive to public engagement or on implementing transformative human rights practices, which in turn reinforce the public sphere.

In ruminating on this dilemma, I harken back, more than a little ironically to lessons from my negotiation studies in the early 1980s where amidst the darkness of the myriad competitive models of bargaining behaviour, glimmered a small number of strategies designed to foster cooperation. One of these was the GRIT (Graduated Reduction in Tension) strategy based on the simple but effective idea that one party could "induce" the other to cooperate by making a small cooperative gesture and then waiting until it was reciprocated. The irreducible point was that a step toward change has to be taken and that step has to encompass the values intrinsic to the desired outcome. In the end then, steps must be taken to both foster transformative human rights practices and to address structural inequality so as to create conditions for effective functioning of the public sphere.

C. Evaluating Transformative Human Rights Practices

Evaluation is an integral part of reform processes. It engages the critical learning aspects of transformative human rights practices. In the context of this study, evaluation can encompass two

approaches or sets of criteria. One is based on assessing human rights practices against the transformative ideal developed in this study. The second is to develop an external standard with which to measure transformative human rights practices against the larger objects of achieving social justice. This section initiates a discussion on these two approaches to evaluation.

Procedural indicators can be developed to measure whether or not transformative human rights principles are being met in practices, processes and institutions. At present, the work of legal institutions is gauged according to quantitative indicators such as the number of agreements reached and the time and costs involved in attaining those results. This approach should be augmented by qualitative indicators about the processes themselves. This could involve asking the following types of questions:

- is the process accessible?
- does it protect participant's rights?
- are unrepresented interests acknowledged and safeguarded?
- if an agreement is reached, does it provide a sense of finality?
- does it reflect up to date knowledge?
- does it have an impact on policy?
- how is it implemented?
- how well does it last?
- do participants gain greater understanding of themselves, of their interests, of each other?
- do they gain the ability to continue on their own without assistance of a third party?
- do they find the process useful for dealing with other disputes or problems?
- what degree of institutional change results from the intervention?¹⁹
- does the process invite and welcome a variety of cultural ways of understanding the issue?

¹⁹Dukes, *Resolving Public Conflict*, at 179.

- is the process flexible enough to accommodate a variety of cultural ways of communicating?²⁰

Similarly, procedural indicators that could be applied to public participation processes include: adequate time for consideration of the issues; free exchange of information; visibility and outreach to the affected and interested public; openness of the decision-making procedures; and commitment on the part of the authorities to use the product of the process.²¹

The purpose of these types of indicators is to measure the degree to which human rights practices integrate the transformative principles of deliberation, reflection, participation and so on. More fundamentally however, procedural indicators can be intimately linked with substantive equality. Participation, or public and private autonomy, is key to enlarging people's choices and empowering them to transform the oppressive social relations that limit their choices about life and their capabilities to live lives of dignity.²² The transformative approach is founded on the understanding that process and outcome are integrally linked therefore an assessment of practices requires looking to results. However, this assessment can not be made only on a case-by-case basis. It requires a more global, institutional approach.

The importance of a global review of human rights efforts was recognized by the *Canadian Human Rights Review Act* Review Panel.²³ In the context of the work of the Canadian Human Rights Commission this would involve asking broad questions about the effect of the *Act* on the lives of Canadians: "Are we achieving substantive equality in Canada?" "What systemic barriers have been eliminated?" Answers would be supplied by quantitative and qualitative information.

²⁰These last two points were suggested to me by Michelle LeBaron.

²¹*Id.*, at 65.

²²Yamin, "Reflections on Defining, Understanding and Measuring Poverty", at 274.

²³at 99.

The Review Panel noted that standards in the form of "human rights indicators" will have to be developed to facilitate this type of global review. Monitoring progress through human rights indicators would assist the Commission in its work and serve a number of important functions including: increasing understanding about systemic discrimination; increasing collective awareness; reinforcing educational function; focusing on the need to enforce remedies; and increasing expertise and accountability.²⁴

The transformative framework can be applied to the development of these social justice indicators. At the outset, this means that the process of developing indicators should itself be a deliberative, reflective and participatory process.

The transformative approach also requires that social justice indicators integrate formal, procedural and substantive aspects of equality. Procedural indicators were discussed above. Formal indicators relate to exclusion and can be developed in a relatively straightforward manner.²⁵ Substantive indicators require the development of new approaches and methodologies. However, progress has been made in this area. Examples include indicators of gender equality developed by Status of Women Canada²⁶ and the United Nations Development Program's Human Development Index which measures how people are faring rather than how much nations are producing.²⁷

This brief discussion makes it clear that it is difficult to carry out evaluation in an ad hoc way. This suggests the requirement for ongoing institutional responsibility for monitoring progress toward social justice. Human rights commissions can and should monitor the impact of their particular statutory regime. Similarly, legislatures could develop a more defined role in monitoring Charter

²⁴*Id.*, at 100.

²⁵The frameworks of legal personhood and citizenship set out in Chapter 1 provide an excellent starting point for measuring exclusion as the first step toward remedying inequality in terms of basic protections.

²⁶Leroy Stone, ed., *Gender Equality Indicators: Public Concerns and Public Policies* (Ottawa: Status of Women Canada, 1998).

²⁷Dukes, *Resolving Public Conflict*, at 101.

compliance, for example by establishing a parliamentary committee charged with this responsibility. The committee could hold hearings, issue reports, and make recommendations to enhance the implementation of human rights norms.²⁸ This option has a number of advantages attributable to the fact that legislative committees operate through a public process that can foster reflective dialogue. In addition, a more comprehensive approach should also be considered.

A natural opportunity for the development of a comprehensive approach to evaluation and monitoring is provided by the reporting processes under international human rights agreements within the United Nations (UN) system. Each international agreement such as the International Covenant on Economic, Social and Cultural Rights and the Convention to Eliminate All Forms of Discrimination Against Women establishes a UN committee responsible for monitoring compliance under the agreement. For the most part, this process operates by a state providing the committee with a periodic report on its implementation of the agreement. State representatives meet with the committee to discuss the report. The committee then writes a report on its observations, including recommendations for improved compliance. In some cases, non-governmental organizations also provide separate reports to the committee and participate in these discussions independently from the state representatives.²⁹

The purpose of these reporting and monitoring processes is the establishment of ongoing dialogue which engages state parties in the implementation of international human rights instruments.³⁰ This ongoing dialogue also has transformative potential. However, for the most part this potential is unrealized because the process leading to development of the state report is not a public deliberative

²⁸In addition to reports on specific substantive issues, this can lead to more refined statutory conceptions of rights. For example in the European Parliamentary this practice led to developments such as the Community Charter of Fundamental Social Rights for Workers adopted in 1989. For a discussion of this point see Jo Shaw, "Process and Constitutional Discourse in the European Union" (2000) 27 *Journal of Law and Society* 4, at 34-5.

²⁹For views on this process in general and with respect to specific international agreements, see essays in Alston and Crawford, ed., *The Future of UN Human Rights Treaty Monitoring*.

³⁰Lisa Woll, "Reporting to the UN Committee on the Rights of the Child: A catalyst for domestic debate and policy change?" (2000). 8 *The International Journal of Children's Rights* 71.

one.³¹ Similarly, the UN committee report and the government's response to it are not subject to public deliberation. Oversight of this process by a public institution would assist in making this reporting process a transformative human rights practice. In my view, this institution should operate at arms length of Canadian governments and act as convener to draw together the views of the federal and provincial governments as well as members of civil society.³² The institution would also have the capacity to carry out independent research in order to fulfill its functions.

Although initially it may appear that this initiative would distract attention away from the legal-political dialogue on domestic human rights, in fact it could reinforce it. Statutory, constitutional and international human rights documents can all be related to a single normative order. For the most part, the subject matter of the UN reporting process is comprised of the commentary on political acts and judicial decisions. Drawing these elements together in a public process could make an evaluation process more meaningful and effective. An institution and related practices of this type would make a substantial contribution to a public ethos that respects and promotes human rights.

There are numerous options for a monitoring bodies and discussion of this institutional developments along this line could include whether it is preferable to have one body that monitors compliance with all levels of human rights obligations (statutory, constitutional and international) or separate bodies for each of these purposes. The trade off is between comprehensiveness of a unitary approach and the manageability of distinct approaches. The purpose of introducing this idea is not to propose a specific reform but rather to draw attention to the transformative potential of an additional site of discourse within the public sphere. Whatever institutional arrangement is agreed upon, or even if this process remains under government control, the important point is that monitoring should be conceived as a transformative human rights practice. It should encourage

³¹*Id.*, at 72-3.

³²Potentially this type of institutional could be administered by an existing institution such as the Canadian Human Rights Commission or a research institute.

public participation, reflection and dialogue on human rights norms in a way that assists members of society to understand "how decisions that affect rights are made, by whom and when."³³

7.3 Recreating the Public Sphere

This study has focused on the role of legal institutions in promoting a broader human rights discourse and transformative human rights practices. However, an essential part of the transformative ideal is a robust public sphere within which various state institutions interact with members of civil society with a view to enhancing social justice. The argument was made that the public sphere needs to be recreated along normative lines. This would enable it to fulfill its functions including that of mediating the inter-institutional dialogue between legal and political institutions in the development of human rights norms.

The courts and human rights commissions have an important role to play in recreating the public sphere. In general terms, promoting transformative human rights practices assists in this process by establishing and maintaining the principles of inclusion, equality, reasonableness and publicity in discourse. Many of the specific reforms and strategies developed in this study can be seen as contributing to a strengthened public sphere in tandem with increasing shared understandings of human rights norms.

These ideas are reinforced in two brief discussions. The first involves the idea of fostering a human rights ethos as a general way of conceiving of the relationships among the elements of society within the public sphere. The second is a more focused look at fostering a transformative remedial discourse as one method for enhancing the public sphere and transformative practices. These discussions help to illustrate the nature of the task involved in recreating the public sphere.

³³These points are made with respect to the establishment of a national commission on social and economic rights by Day and Brodsky, *Women and the Equality Deficit*, at 154.

A. Fostering A Human Rights Ethos

A human rights ethos is a normative spirit or attitude that operates on a day to day basis and is present in all interactions and practices. A public ethos is one that characterizes a community as a whole and a governmental human rights ethos operates within state functions. Social transformation requires strengthening both of these interdependent aspects of the human rights ethos. Part of the weakness of public sphere is the uneven ethos of human rights in both individual and institutional terms. It is a circular problem, since the paucity of this normative spirit and attitude weakens the dialogue and a broader dialogue is needed to strengthen this ethos.

Critical reflection and dialogue are key to fostering a greater human rights ethos. In their interactions with members of civil society and government actors, legal institutions facilitate these deliberative and reflective practices. However, an ethos can not operate in isolated instances, actors must reflect and act upon the requirements of human rights in all of their activities. The goal is to engage human rights thinking in day to day practices and discourses.

At a governmental level, this increased engagement with human rights can be seen in terms of constructing and working with "constitutional resources" and translating them into practices that eventually become the "*acquis*", or received reality.³⁴ Similarly, the public ethos involves an obligation on everyone of us to "take appropriate steps" to ensure respect for human rights everyday. All laws and particularly, a law concerned with human rights "can only acquire its real meaning and significance if it is accompanied by real moral self-awareness."³⁵ At an individual level, the underlying idea is that everyone has a duty to promote equality. An equality duty can be

³⁴Shaw, "Process and Constitutional Discourse in the European Union", at 18, referring to A. Wiener, "The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance" (1998) 4 *European Law J.* 294.

³⁵Statement made by Vaclav Havel, President of the Czech Republic in his comments on signing the Convention on the Rights of the Child, with specific reference to the role of parents. Quoted in S.Toope, "The Convention on the Rights of the Child: Implications for Canada" in Michael Freeman (ed) *Children's Rights: A Comparative Perspective* Dartmouth Publishing Co., 1996), at 57.

institutionalized through oaths of office for public officials and in similar ways by members of civil society in their associations.³⁶

Rights are respected not simply because the courts say that is what they mean but because that authoritative statement is integrated into a new social consensus on the meaning of the right. This involves mediation of some kind. The process of mediating rights can result in altering the understanding of the rights norm, as well as apply to a specific situation. This mediation metaphor can be applied both to the inter-institutional dialogue that fosters a governmental human rights ethos and to the broader discourse in the public sphere that contributes to a public ethos.

The dialogue between legal and political institutions is by definition an ongoing process of interpretation. This is the essence of constitutionalism. Conflict between these institutions contributes to social transformation. While processes based on compromise foreclose alternative visions for the sake of settlement, democratic constitutionalism "does not foreclose on alternative options, but rather provides a mechanism through which space for alternative approaches and visions, within a set of bounded alternatives, is continually retained."³⁷ In this sense, disagreements between the judiciary and the legislature are not to be avoided, but rather courted because it is the continuing conflict implicit in judicial decision-making that creates space for dialogue and potential for change. While conflict is to be welcomed, it is equally important not to see the relationship between legal and political institutions in adversarial terms. The dialogue between courts and legislatures can be seen as a form of "meta" conflict resolution. An alternative way to conceptualize this relationship is by reference to the model of transformative mediation.

³⁶It could be argued that legislators already owe this duty under the Charter and that all Canadians have the same responsibility under human rights legislation. However my suggestion would involve taking an additional reflective step to accept this responsibility. For example, in Northern Ireland, Ministers have to affirm the Pledge of Office which includes the duty: "to serve all the people of Northern Ireland equally and to act in accordance with the general obligations on government to promote equality and prevent discrimination." Harvey, "Governing After the Rights Revolution", at 92.

³⁷Heinz Klug, *Constitutional Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000) at 180.

Transformative mediation principles and practices suggest that judicial decisions and political acts can be seen as narratives flowing from these institutions. The public sphere is the mediator in a figurative rather than a literal sense. The public sphere engages the state institutions and has a role in assisting them in the process of deconstructing and reconstructing the narrative. Human rights norms are developed by all three segments of society and transform the narratives and the background social norms that shape them.

The transformative mediation metaphor suggests a number of ways to improve the dialogue between legal and political institutions so as to enhance an ethos of human rights. First, a discursive understanding of this dialogue should be privileged over an adversarial one. Constitutionalism is best seen as a continuing process of negotiation and renegotiation.³⁸

This metaphor advances our thinking in this regard by emphasizing the idea of a "constitutional continuum" rather than "constitutional moments".³⁹

The second is the requirement to find avenues of engagement outside of the context of litigation on the meaning of specific rights. For example, courts can promulgate basic human rights principles that have a general application to government actions. In the Canadian context, the Supreme Court has enunciated fundamental constitutional principles such as freedom of expression and the protection of minorities, it is anticipated that equality will join this list one day.⁴⁰ General pronouncements of this type assist in the learning process of law.

³⁸Harvey, Morrison and Shaw, "Voices, Spaces and Processes in Constitutionalism" (2000) 27 *Journal of Law and Society* 1, at 2.

³⁹Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis" (1998) 26 *Politics and Society* 143, at 165

⁴⁰See discussion of cases and this proposal in Chapter 1.

This same approach can be taken to building the public ethos through developing human rights standards that mediate between norms and their application in a broad range of circumstance.⁴¹ This relates back to the idea of rights influencing litigation discourses outside of the public law context. For example, the existing "best interests of the child" could be reformulated to be consistent with the Convention on the Rights of the Child.⁴²

A governmental human rights ethos can be cultivated by multiplying the connections between legal and political institutions and political institutions and civil society. Similarly, a public human rights ethos can be fostered through the proliferation of sites of human rights discourse within the public sphere. The courts and the human rights commissions are two sites of central importance. However, they are inadequate on their own because only a small number of people can participate in these processes. Access is limited by a number of features but even under the best of circumstances access to these institutions would be insufficient.

A strengthened public ethos will provide members of society with a stronger capacity to intervene effectively in the dialogue between legal and political institutions. This dialogue affords much greater opportunities for public participation by comparison with being a direct party in legal processes. The public sphere mediates this dialogue in a general way through effective public deliberation on political acts and judicial decisions. However, a number of steps could be taken to enhance this mediating capacity. One step is to open up this inter-institutional dialogue to public scrutiny. Making this discourse open to the public dramatically opens up the dialogic potential.

⁴¹Levesque, *Sexual Abuse of Children*, at 24-25. Levesque defines the mediative function of rights standards as "a standard that assists in the mediation of conflicts that arise in interpretations of rights." He contrasts this function with the interpretive and evaluative functions of rights. For a similar point in the context of private law doctrines, see Justice Aharon Barak, "Constitutional Human Rights and Private Law" (1996) 3 *Review of Constitutional Studies* 221. One of his suggested approaches is the development of "new legal tools" by renovating old tools to create new understandings of concepts such as good faith, negligence and public policy (at 261-2).

⁴²I develop this idea in my paper "Hearing the Voices of Children: Creating Spaces and Processes for the Implementation of Children's Rights" paper to be presented at The International Conference on the Domestic Application of International Law, Peking University, Beijing, October, 2001).

Another prerequisite to fostering a public human rights ethos is an enhanced discourse on the nature of equality rights norms. This was mentioned in Chapter 1 in terms of a requirement to eradicate the ghost of formal equality understandings and nurture more substantive understandings. This is not a difficult feat, but it does necessitate personal engagement in a reasoned discussion.⁴³ This engagement is more likely to develop in a specific situation involving making a public judgment that in abstract terms. A large number of informal deliberative approaches that could be utilized in this endeavour have been discussed in this paper. These include: transformative public legal education; study circles; policy juries; critical learning processes; interactive public hearings; and, the "Listening Project".

The idea of enhancing a broad discourse on human rights by fostering a governmental and public ethos that protects and promoted human rights is explored in a focused way in the next section dealing with dialogues on remedies.

B. Transformative Remedial Discourse

A human rights ethos can be fostered through a transformative remedial discourse. Within a traditional framework, the institutional capacity to formulate and enforce legal remedies is seen as one of the strengths of legal institutions. However, in this study, these functions are seen as a shared responsibility among legal institutions, political institutions, and members of civil society as mediated by the public sphere. Remedial discourse should be seen not as much as a dialogue between the courts and legislatures and more as a conversation between governments and civil society with the court playing a mediating function in the public sphere.

This section briefly investigates the possibilities for a transformative remedial discourse in existing approaches by legal institutions and explores other potential steps that could be taken. The focus is

⁴³I have had the opportunity to engage people in this conversation in a wide variety of fora, from meetings with groups of lawyers to elementary school students and have found it relatively easy to convey the concept of substantive equality.

on legal institutions can help to foster discourse bearing in mind the shared responsibility for remedies.

At the present time, remedial discourse is best characterized as a limited conversation. These limitations are due to a number of features. First, the courts and commissions tend to address infringements of human rights by providing either a specific remedy to the claimant on the one hand, or very general guidance to the government, on the other. Neither of these approaches assists in the framing of an ongoing dialogue. Secondly, relatively little attention has been paid to developing institutional capacity for monitoring the implementation of monitoring remedies.

The transformative approach can be applied to both the formulation of remedies and their implementation. This approach suggests that the courts and commissions should formulate remedies that engage the parties in an deliberative, participatory and reflective application process. As demonstrated in the discussion of transformative mediation practices, remedies should be formulated in manner that recognize and address both the individual and systemic consequences of inequality. Rather than simply prescribing specific institutional changes, systemic remedies should establish institutional mechanisms or procedures for ongoing change. This approach reinforces the prospective potential of legal remedies.

Transformative human rights principles can also offer guidance for extending the remedial discourse beyond the initial formulation of remedies to a continuous process of implementation. This approach builds on the prospective quality of remedies and integrates processes of critical reflection. The result would be an increased capacity to monitor whether the remedy was achieving its intended results.

Envisioned in this way, legal institutions initiate a remedial discourse through a decision in a given case.⁴⁴ According to the transformative ideal, this initial contribution to the dialogue should

⁴⁴Alternatively, this discourse is initiated by the parties themselves through mediation.

establish both general principles for interpreting the human rights norm in the circumstances and a process for applying these principles on an ongoing basis. This can be accomplished either in the specific way a remedy is formulated or more generally in the reasons for decision. The focus in this discussion is on the courts and the Charter but it is equally applicable to human rights tribunals.

A good example of this initial step in a transformative remedial discourse is the Supreme Court of Canada's decision in *Tawney Meiorin's case*.⁴⁵ This case involved the proper legal test to be applied under human rights law to determine whether or not a job requirement is discriminatory.⁴⁶ The decision affirms that employers have a broad duty to promote equality within the workplace in these terms:

Employees designing workplace standards owe an obligation to be aware of both the differences between individuals and the differences that characterize groups of individuals. They must build conceptions of equality into workplace standards.⁴⁷

The Court provides clear and detailed direction as to how this obligation is to be discharged. The decision sets out a list of questions to be considered in ensuring that both the procedural and substantive components of the duty to accommodate have been met. This is above and beyond the definition of the legal test that a Court will follow in determining whether there is discrimination.⁴⁸ This list is reproduced here because it is illustrative of the strengths of this approach. In inquiring as to whether the duty to accommodate has been discharged by the employer, a Court will ask:

⁴⁵*British Columbia(Public Service Employee Relations Commission) v. BCGSEU*, 1999 3 SCR 3.

⁴⁶The specific facts were that Ms.Meoirin was dismissed from her position as a forest firefighter because she could not pass one element of a four-part fitness test despite the fact that she had received positive evaluations for her work performance. The Supreme Court held that the test had an disproportionate adverse impact on women, was based on existing norms developed in a male-dominated workplace and that the test was not sufficiently related to the requirements of the job.

⁴⁷at para. 68.

⁴⁸The Court developed a three-step analysis that is to be applied to both direct and adverse effects discrimination.

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standards?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?⁴⁹

Although this list of factors is written from the perspective of a human rights review of what the employer has done, in effect it provides explicit instructions for what steps must be taken in order to avoid discrimination. This procedural aspect of the duty to accommodate is completely consistent with transformative principles. It delineates a deliberative and participatory process that encourages the parties involved to scrutinize underlying norms in a reflective manner. It integrates a consideration of the individual and systemic manifestations of discrimination. Further it builds in consideration of equality norms into the reconstruction of workplace policies and practices.

The Supreme Court of Canada's decision in this case contributes to a transformative remedial discourse because it builds a principled framework within which employers and employees can undertake a dialogue to ensure that the workplace lives up to human rights norms. The framework ensures that these norms inform both the process and substance of this implementation. Human rights commissions or courts may be called upon to intervene in this discourse if matters cannot be

⁴⁹at para.65.

resolved, but it helps to foster a human rights ethos by establishing the framework for implementing equality norms on a day to day basis through engaged dialogue between the parties. The remedial discourse operates on three levels: to guide the dialogue used to review workplace norms; to guide reconstruction where necessary; and, to inform future judicial review of workplace standards.

The approach taken by the Court in Tawney Meiorin's case extends beyond clarifying the law and applying it to the specific facts of this case. It has had both an immediate and lasting effects on discourse within the public sphere because the language of the case provides clear guidance to employers and what the nature of their responsibility with respect to equality norms.⁵⁰

In the context of Charter litigation, the courts have favoured granting declaratory relief in very broad terms that provide governments with a large degree of latitude to formulate a specific response.⁵¹ This can be contrasted with the more aggressive structural injunctive relief that has characterized the remedial approach of US courts in rights cases. The Canadian approach creates considerable space for the integration of transformative practices, arguably even more room than when a specific remedy is ordered. However, transformative human rights practices suggest that the structure of remedies should facilitate further discourse about equality norms. A number of steps could be taken toward this end.

⁵⁰This impact has been confirmed in conversations that I have had with several labour arbitrators. In addition, at a conference organized by Women in Trades and Technologies in March 2001, many participants provided examples of how the decision had been utilized to address discriminatory practices in the workplace. For example, a representative from BC Hydro discussed how she had brought the decision to the attention of senior management and how it had lead to major changes within that workplace. In my opinion, the clear and comprehensible style of the decision contributes greatly to its impact within public discourses.

In a great legal irony, the Supreme Court could grant only a very limited remedy to the individual claimant in this case because the litigation arose in the context of a labour arbitration. The Court was limited to the forms of relief that the arbitrator could grant and therefore could not grant a systemic remedy. Nevertheless, the decision resulted in a virtually immediate move by the government of British Columbia to voluntarily change the policy that had been ruled discriminatory.

⁵¹Kent Roach, "Remedial Consensus and Challenge in Equality Rights and Minority Language Cases" (Winnipeg: Court Challenges Program of Canada, 2001).

As suggested by the decision in the Meiorin case, the courts should provide more guidance to the parties in its initial decision. For example, the courts could require governments to consult both with the claimant and other affected parties during the process of formulating a response when the Court declares that a given law is invalid because it infringes a Charter right. In some cases, governments have engaged in a public dialogue as part of the policy-making process to formulate a response to the declaratory order. For example, the federal government undertook consultations following the Supreme Court's declaration in *Corbiere* that the exclusion of off-reserve Indians from band elections violated the equality rights of this group.⁵² However, claimants and groups have not always been happy with the consultation process or the outcome.⁵³

One of the keys to a transformative practices is a remedial discourse is participation by affected and interested parties, including the claimant, in the formulation of specific remedies based on the court's general prescription.⁵⁴ Although members of the Supreme Court have recognized the value of participation,⁵⁵ more needs to be done to make declaratory relief consistent with transformative practices. Perhaps most importantly, there is no guarantee of participation.

⁵²*Corbiere v. Canada* [1999] 2 S.C.R. 203. The first stage of the government's response included funding for four Aboriginal groups to participate in this process as well as training sessions for bands to facilitate their participation.

⁵³For example, in applying the decision in *M. v. H.*, [1999] 2 S.C.R. 3 (a declaration that exclusion of same sex couples from support provisions of family law legislation was unconstitutional because it infringed the claimant's s.15 right to equality), the successful Charter applicant, as well as some organizations representing gays and lesbians were strongly opposed to the manner the Ontario government took in extending benefits and obligations in light of the court's ruling because it amounted to further discrimination. Jason Murphy, "Dialogic Responses to *M. v. H.*: From Compliance to Defiance" (2001) 59 *U.T. Fac. L.Rev.* 299. The successful applicant asked the Supreme Court to re-visit the matter but her request was denied without reasons from the court. Many Aboriginal groups have also expressed their dissatisfaction with the federal government's approach to implementing the decision in *Corbiere*, especially in terms of the amount of time taken to develop a plan of action. Roach, "Remedial Consensus", at 30-1.

⁵⁴Sheppard, "Caring and Human Relations", at 343.

⁵⁵For example, in *Corbiere*, Justice L'Heureux-Dube stated that delayed declaration would in her view "in appropriate cases encourage and facilitate the inclusion of groups particularly affected by legislation" in a dialogue about remedies. (at para 116)

Beyond participation, courts should grant remedies that foster an ongoing dialogue that is consistent with equality norms. This does not involve judges dictating the details of compliance. Nor would that approach be consistent with transformative practices. In most cases, there is a range of options that comply with the Court's interpretation of the right to equality. Rather than trying to develop comprehensive remedies, the focus should be on structuring the compliance process through the formulation of remedial principles in each case. The principles will then shape the remedial discourse that follows a Charter decision.

This approach also fosters the prospective impact of remedies beyond the specific case and can lead to the generation of solutions that address individual and systemic inequalities. Remedies must operate at various levels of change in order to enhance transformative possibilities. Courts should aver to the need to expand remedies to integrating consideration of human rights norms at the individual, institutional and structural levels.⁵⁶ This is my view of the strength of the decision in *Tawney Meiorin's* case where the Court provided guidance in terms individual duty on employers, institutional in terms of procedures to be followed, and analytic in terms of substance of the duty to accommodate. Along similar lines, in the *Beaulac* case, the Supreme Court recognized that governments are obliged to do all that is "practically possible" to ensure minority language rights, a comment that helps to shape government attitudes in addition to setting out the specific approach to remedy in the case.⁵⁷ In effect, *Meiorin* tells employers to do all that is practically possible with respect to ensuring equality rights in the workplace.

Once the legal institution has initiated the remedial discourse then it is up to the relevant governmental and private actors to engage in this dialogue within the public sphere. The transformative mediation model is particularly conducive to fostering this phase of the remedial dialogue. This approach also enables the development of systemic remedies since it encompasses a reflective and dialogic scrutiny of the underlying social norms that contribute to inequality.

⁵⁶Another way to think of this is to focus on individual and systemic remedies. But I prefer the four pronged approach (individual behaviour and attitudes, ideas, institutions and structures).

⁵⁷*R.v. Beaulac* [1999] 1 S.C.R. 768, at para.24.

Courts and human rights commissions can help to foster transformative human rights practices in the remedial discourse by maintaining jurisdiction until the remedy is fully implemented.

The courts have retained jurisdiction for this purpose in a number of Charter language rights cases⁵⁸ and in at least one s.15 case.⁵⁹ However, the law pertaining to the extent of a court's ability to retain jurisdiction in Charter cases is unsettled. It is an issue that is likely to be decided shortly by the Supreme Court of Canada in a Nova Scotia language rights case, *Doucet-Boudreau v. Nova Scotia*.⁶⁰

From the transformative perspective, the retention of jurisdiction allows the court to do more than simply enforce remedies, it provides a forum for the court to resolve disputes about the meaning and implications of a general declaration. In the words of the dissenting Court of Appeal judge, court supervision provides "a means of mediation" to achieve the result in a case.⁶¹ However, continuing resort to adversarial litigation processes to ensure compliance does not contribute to a conception of remedial discourse that is consistent with transformative human rights practices. An alternative approach is for the court to maintain jurisdiction but in the form of a court-supervised mediation process that would be part of the declaratory order.

⁵⁸Numerous examples exist in litigation concerning official minority language rights claims under section 16-23 of the Charter. Two examples will suffice. First, in the *Manitoba Language Reference*, the Supreme Court of Canada retained jurisdiction over the matter by suspending the declaration of invalidity for the minimum period of time necessary to translate the unilingual laws. This issue returned to court a number of times as information emerged on what the minimum time was for the translation process. See for example, *Reference re Manitoba Language Rights supplementary reasons* [1985] 2 S.C.R. 347; [1990] 3 S.C.R. 1417; [1992] 1 S.C.R. 212. A second example can be found in *Marchand v. Simcoe County Board of Education (No.2)* (1987) 44 D.L.R. (4th) 171 (Ont.S.C.), where court ordered injunctive relief against a school board and retained jurisdiction to the extent that it was willing to consider whether the school board's proposed plan satisfied the requirements of the Charter.

⁵⁹In a British Columbia case dealing with the equality rights of a child with disability, Allan J. issued a general declaration but maintained a "limited supervisory role" so that the applicants could renew their premature application for mandatory relief if the government did not implement an effective program in a timely manner. *Auton (Guardian ad litem of) v. British Columbia* (2000), 80 C.R.R.(3D.) 333 (B.C.S.C.) at para. 47.

⁶⁰2000 N.S.J. No. 191 (T.D.) rev'd with respect to remedies 2001 N.S.J. No.240 (C.A.). Leave to appeal to the Supreme Court of Canada filed. In this case, the trial judge issued a declaration of entitlement to homogeneous facilities and programs for French language education without unreasonable delay and the that the defendants were to make their best efforts to provide such programs and facilities.

⁶¹at para 12. per Freeman J.A.

Transformative mediation would further the collaboration required by the parties to implement an effective remedy. It would assist the parties to understanding and deal with barriers to compliance and lead to the reconstruction of a remedy that is fully consistent with equality norms. A mediation approach would also foster an ongoing rather than a sporadic process. It would create the opportunity for regular reports on progress and provide assistance in dealing with problems that arise during this process. The mediation process could be overseen by a court official rather than the trial judge herself. Judicial assistance could be called upon during the mediation process when necessary.

One model for this approach is the court's role in monitoring settlements in class proceedings wherein a judge and/or her designate monitor the operation of a settlement to ensure that it is properly implemented.⁶² While this example does not entail transformative mediation, it is an informal collaborative process.

A transformative remedial discourse that ensures participation, deliberation and reflection in the implementation of human rights principles will make a strong contribution to a human rights ethos. Transformative practices can be facilitated through the way a court or commission initially formulates a remedy and by providing a continuing mediation context through which the parties can apply the remedy to the specific circumstances.

7.4 Transformative Practices and Social Justice

Transformative human rights practices, a broader human rights discourse within a recreated public sphere and a stronger human rights ethos are three interrelated requirements in making progress toward social justice. The implementation of transformative human rights practices involves changes at every level, from the individual to institutions to society at large. It requires a fundamental shift at the level of ideas concerning our philosophical approach to conflict resolution

⁶²This has been the experience with the settlement in the Hepatitis C class action.

in the legal system, the ideology of human rights, and the legal institutional role in achieving social justice.

Transformative practices are aimed as much at changing the way people relate to each other and to society as they are about how institutions and structures work. The ambit is much wider than achieving a result in a specific conflict. The notion of outcomes is very different than the current focus on who won or lost. It involves questions of what was learned in the conflict resolution process, how the relationships between the parties and the institutional structure were affected, and so on. Transformation must be initiated at this ideational level or else reform will be doomed to the same fate as the "ADR" movement. That is, a movement that modifies the surface and periphery of legal approaches to conflict without touching the foundation of adversarialism.

Over time this foundational philosophical shift will come to be reflected in a myriad of changes at the individual, institutional and structural levels involving the courts and human rights commissions, political institutions and the public sphere. There is a dialectical relationship between change at the level of ideas and practices, reform at one level inspires further reform at the other.

The implementation of transformative human rights practices is best seen as an ongoing, evolving process focused on the central notion of promoting a broader discourse on human rights. In this study, the central discussion has been on process and procedural changes but always in the context of the inextricable link between process, substance and relationships. This evolving transformative process is enhanced through critical reflection to ensure that it is leading toward greater social justice.

Evaluating progress toward social justice is difficult because there is no coherent vision at the end of the road. We have never experienced social justice or equality and hence they cannot be described. One of the virtues of emphasizing transformative human rights practices within a broad public discourse is that social transformation is seen as the outcome of ongoing negotiation in which

existing inequalities and entitlements are revealed and can be addressed. This approach assists in the creation and recreation of a human rights ethos that guides the path toward social justice.

It is important not to lose sight of the goal of social justice. Even though it can not be envisioned in substantive terms as an end-state, the transformative ideal portrays it in terms of an ongoing learning process:

The kind of community we speak of is founded on a commitment to dialogue, to the shared creation of meaning, rather than on the privileging of individuals in competition with each other to have their needs met. It is a community in which power relations are always open to contest and where respect flourishes. It is a place where people are curious about one another and where new meanings are always being created in response to the challenges provided by constantly changing contexts. It is a world in which people are encouraged to have a voice in the production of discourses that shapes them.⁶³

This approach to community is consistent with the relational nature of human rights, and particularly the right to equality. It underscores the importance of human responsibility for social transformation.⁶⁴ In the beginning and at the end, achieving social justice requires an engagement not simply with what is, but with what ought to be.

⁶³Winslade and Monk, *Narrative Mediation*, at 250.

⁶⁴In Martha Minow's words: "In this way, the notion of rights as tools in continuing communal discourse helps to locate responsibility in human beings for legal action and inaction." in *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, NY: Cornell University Press, 1990) at 309.

EPILOGUE

Many years ago now, when I first began formulating my thesis research I thought in the relatively simple terms of wanting to find more effective mechanisms for the enforcement of human rights through the courts and the human rights commissions. I was in the thick of things in the world of law reform and active in test-case litigation and other forms of advocacy for women's right to equality. I was searching for pragmatic solutions to the objective that had propelled me into law school and continues to motivate me, that is: "the magnificent goal of equal dignity for all."¹

While my central preoccupation with the use of law to achieve social justice remains unchanged, my approach has shifted dramatically. The more research and reflection I did, the more questions I had and the further away from answers and solutions I seemed to be. The number of unanswered questions grew as I worked on several related policy initiatives that included considerations of whether and how to integrate "alternative dispute resolution" into the civil justice and human rights systems.² Ultimately, these policy studies were unsatisfactory to me because they did not address the more fundamental problems with the current legal system. As an activist and legal policy analyst, I was interested in solutions but, unfortunately, my academic research notes at that point consisted almost entirely of interrogatory sentences.

Eventually, I recognized that I would not be able to find answers to my thesis questions if I remained within the existing paradigm, one that remains largely framed by liberal legal philosophy, and the various internal debates within it.³ This realization launched an odyssey of multi-disciplinary travels

¹To borrow the ringing phrase coined by Cory and Iacobucci JJ in *Vriend*.

²I was Project Director to the Canadian Bar Association's Systems of Civil Justice Task Force in 1995-7 and was commissioned by the Canadian Human Rights Act Review Panel to write a paper on the dispute resolution options for the Canadian Human Rights Commission.

³Within mainstream legal-philosophical studies, this debate remains largely one based on the positivist-naturalist dichotomy, despite strong challenges from the critical and postmodern schools of thought. The hold of this

that took me back to the conflict resolution literature and critical philosophy that I had studied at the graduate level before law school and forward to recent work in the fields of socio-psychological research and sociological, political, critical legal and linguistic theory.

There is a startling convergence between these fields centering on a renewed emphasis on community and relational thinking, on discourse and deliberative practices. Together, the many connections between these disciplines amount to an emerging alternative paradigm in the social sciences.⁴ This intellectual shift is inextricably tied into corresponding trends in civil society. Together they constitute a social movement with a common goal of social justice.

This study has developed a conceptual framework based on this nascent paradigm and, more specifically, on theories of communicative democracy and transformative conflict resolution. One of the underexplored facets within these theories is the role of human rights norms in deliberation and conflict resolution. I have argued that rights have an integral function within these processes and hence within the transformative framework developed here.

This transformative framework has been applied to the questions surrounding the potential legal institutional role in promoting social justice. It has concluded that Canadian courts and human rights commissions should adopt transformative human rights practices in order to promote a broader human rights discourse within the public sphere.

The transformative framework is highly normative and will be viewed by some as too idealistic and, hence, problematic. However, this approach is consistent with well-established tenets of critical

underlying philosophy is much stronger in the practice of law than in academic understandings of the role and operation of the law.

⁴A paradigm is more than a theory it is an entire "problematic" or "knowledge culture" which defines what questions, concepts, and hypotheses are even admissible for discussion in the first place and what is even to be a candidate as empirically true or false. For the classic statement of change at the paradigmatic level see, Thomas Kuhn *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

theory. Within this epistemology, ideas have an important expressive and critical function. They are not blueprints, nor are they meant to correspond with a past, present or future reality. Rather, normative alternatives help to create a critical distance from reality, one that allows us to imagine the possibilities for something better than what we see around us.

At one level, the transformative framework is highly normative and theoretical, at another level it provides important guidance for human rights practices and institutional reform. This thesis has made a contribution to these practical considerations through a discussion of specific ways that transformative human rights practices could be integrated into current processes within legal institutions. It has also carried out an initial exploration of ways to ameliorate the human rights discourse between legal institutions, political institutions and the public sphere.

These conceptual and practical conclusions are inevitably only partial ones. They do not provide a full answer to the questions of what role legal institutions could play in achieving social justice within Canadian society and what mechanisms could be developed to carry out this function most effectively. Rather, they provide a contribution to an ongoing discourse on these topics. A lot of work remains to be done on both fronts.

In concluding this thesis, I could set out an entire social action research program. This program would involve applying and evaluating the reform measures that flow from this study with a view to disproving or refining the conceptual framework. There is much more to be learned about transformative human rights practices and the value of a broader human rights discourse. In particular, a more comprehensive approach is required to develop a robust public model for Charter litigation and substantiate the transformative mediation model in the human rights context. Similarly, the nature and dimensions of the dialogues between courts and legislatures, courts and human rights commissions and the mediating role of the public sphere need to be further elaborated.

This conclusion is consonant with the way critical theory works. It begins with a normative critique that results in the positing of ideal alternatives. Connections are found between the current reality

and the ideal, then steps are taken to enlarge upon these "glimpses of possibility." Experience in moving toward the ideal is the subject of further critique which results in the refinement of the ideal or the formulation of an alternative one. The dialectic between the normative and the factual can lead to greater understanding, and also to social justice. An individual research study is simply a moment within this dialectic: a small part of a larger whole.

In addition to the need to further pursue the conceptual and practical conclusions made in this thesis, two gaps in this conceptual framework can be identified. The first is the applicability of the concept of transformative human rights practices within political institutions and the latter's role in promoting a broader human rights discourse. While I have alluded to this briefly, it has mainly been in the context of the relationship of political institutions with the courts rather than as an independent area of inquiry.

Secondly, I have only briefly touched on the role of civil society and have forsaken any consideration of the role of the economy. Clearly these two segments have a major role to play as subjects within, not merely objects of, human rights discourses. In particular, the potential of integrating transformative human rights practices within the economy is a tantalizing one that has to be left to another day.

The conceptual vision presented here is ideal but not utopian. I have experienced glimpses of communicative democratic interaction over difficult and initially divisive issues in my participation in some civil society associations. I have stood in one of the oldest and most beautiful European deliberative chambers in Guernica, Spain and been moved by the strength and persistence of democratic resistance. A democratic commitment that was initiated in the meeting place of a thousand year old oak that still provides shade to the chamber and persisted in defying the Franco dictatorship and its devastating bombing raids. I have read Marge Piercy's tales of communicative democracy with their inspiring vision of the hard but ultimately possible work of participatory and

deliberative practices through which we continually labour to create social justice.⁵

Of course, I have also participated in, witnessed, and read about processes that are much more in keeping with the competitive self-interested model of human behaviour and contractarian and combative relations. I write this epilogue on a day when thousands of people were killed in senseless attacks in the United States. A day that is horrific not just because of the tragedy itself, but also because it reminds us that violence, which is the antithesis of communication, is part of our global everyday reality.

The potential for these two realities is ever-present. Working toward the transformative ideal is more than a matter of supplementing and eventually replacing discourses based on power with reasoned discourse, although this is a necessity. It involves building and sustaining a norm-based vision of the world we want to live in. After all, "Logic is far too lacking in ambivalence. That's why it isn't much use in conflict resolution or processes in general."⁶ At least, logic alone can not guide us there. The path toward social justice requires us to continually reflect on and be inspired by the transformative power of what could be.

⁵*Woman on the Edge of Time* (New York: Knopf, 1976); *He, She and It* (New York: A.A. Knopf, 1991).

⁶Quote from the novel *Maya* by Norwegian philosopher and novelist Jostein Gaardner, tr. by James Anderson (Weidenfield & Nicolson, 1999) at 253.

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